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In the Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-1216

THEODORE RISTAINO ET AL.,
PETITIONERS,

v.

JAMES ROSS, JR.,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Opinions Below.

The opinion of the court below (App. A) is not yet reported. The memorandum and order of the District Court (App. B) is not reported. The opinion of the Massachusetts Supreme Judicial Court (App. C) is reported at Mass. Adv. Sh. (1973) 839, 296 N.E. 2d 810.

Jurisdiction.

The judgment of the court below was entered on December 31, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

I. Whether the decision of this Court in *Ham* v. *South Carolina*, 409 U.S. 524 (1973), is to be accorded retrospective effect upon a conviction which had become final prior to that decision and is now attacked collaterally upon a petition for writ of habeas corpus?

II. Whether the First Circuit Court of Appeals erred in extending the decision of this Court in *Ham* v. *South Carolina*, 409 U.S. 524 (1973), to a new and different factual situation?

III. Whether a failure to comply with the requirements of *Ham* v. *South Carolina*, 409 U.S. 524 (1973), constitutes error of constitutional dimensions requiring reversal of conviction in all instances?

Constitutional Provision Involved.

AMENDMENT XIV.

§ 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

On June 17, 1970, the respondent was brought to trial in Middlesex County Superior Court before a judge and jury on three indictments charging armed robbery (indictment No. 48032), assault and battery by means of a dangerous weapon (indictment No. 48112), and assault and battery with intent to murder (indictment No. 48033). On July 2, 1970, a verdict of guilty on each indictment was returned and the respondent was sentenced to the Massachusetts Correctional Institution, Walpole, for concurrent terms of 18-30 years for armed robbery, 6-10 years for assault with a dangerous weapon, and 18-20 years for assault and battery with intent to murder. The Massachusetts Supreme Judicial Court unanimously affirmed these convictions. *Commonwealth* v. *Ross*, Mass. Adv. Sh. (1972) 873, 282 N.E. 2d 70 (App. D).

The respondent then applied for a writ of certiorari to the United States Supreme Court on the issue of the scope of the voir dire examination of prospective jurors. On January 22, 1973, this Court granted certiorari, vacated the judgment, and remanded the case to the Massachusetts Supreme Judicial Court for further consideration in light of *Ham* v. *South Carolina*, 409 U.S. 524 (1973).

On remand the Supreme Judicial Court addressed the following issue:

" . . . whether the *Ham* decision requires that the defendant's conviction should be reversed on the ground that the trial judge refused to ask the veniremen whether they were racially prejudiced." *Commonwealth* v. *Ross*, Mass. Adv. Sh. (1973) 839 (App. C),

and concluded:

"We do not believe that the *Ham* case announced a new broad constitutional principle requiring that questions, designed to discover possible racial prejudice, be put to prospective jurors in all State criminal trials when the defendant is black (or from some other racial minority group), even when the defendant has requested such an inquiry and the statutory framework permits questioning to discover bias." *Commonwealth* v. *Ross*, *supra*, at 845 (App. C).

The respondent filed a second petition for certiorari with the United States Supreme Court on the same issue as that raised by his previous application. On December 3, 1973, the petition was denied. *Ross* v. *Massachusetts*, 414 U.S. 1080 (1970); Justice Marshall filed an opinion dissenting from the denial in which Justices Douglas and Brennan joined.

The respondent then filed a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts. On June 15, 1974, the United States District Court granted the writ, stating:

"The petitioner had a constitutional right to have the issue of racial prejudice specifically called to the attention of the prospective jurors." (Memorandum and Order, App. B).

The respondents therein filed notice of appeal in the United States Court of Appeals for the First Circuit. On December 31, 1974, the Court of Appeals for the First Circuit, by a two-to-one decision, ordered:

"The writ of habeas corpus shall issue unless within 90 days from the date of this opinion the Commonwealth has either instituted proceedings to retry the petitioner or applied for a writ of certiorari. If certiorari is sought and granted, the issuance of the writ of habeas corpus shall be stayed pending further order of the Supreme Court. If certiorari is sought and denied, the writ of habeas corpus shall issue unless the Commonwealth has instituted proceedings to retry the petitioner within 30 days after the date certiorari is denied." (App. A, Opinion, p. 6.)

Introduction.

The petitioners argue the following reasons why this petition for a writ of certiorari should be granted:

1. This Court has not had the opportunity to rule on whether retroactive or prospective effect is to be accorded *Ham* v. *South Carolina*;

2. The impact of the decision of the court below is substantial and detrimental to the administration of justice in this jurisdiction;

3. A conflict exists among the federal Circuit Courts of Appeal and most particularly between the First Circuit Court of Appeals and the Supreme Judicial Court of Massachusetts as to the proper interpretation of *Ham* v. *South Carolina*, *supra*;

4. The court below has erroneously extended the decision of this court in *Ham* v. *South Carolina*, *supra*, to a new and different factual situation.

The petitioner respectfully submits that the proper development of law requires that the questions posed on this petition be answered.

Argument.

I. The First Circuit Court of Appeals Erred in Giving *Ham* v. *South Carolina*, 409 U.S. 524 (1973), Retroactive Effect.

The First Circuit Court of Appeals stated:

> "The Supreme Court implicitly decided that *Ham* applied to this case when it summarily vacated the judgment of the Supreme Judicial Court of Massachusetts, and remanded that case to that court for reconsideration in light of *Ham*. . . ."

The First Circuit thereby inferred that this Court had ruled that *Ham* was to be given retroactive effect. The petitioner submits that there is no support for such an inference. Nothing in this Court's consideration of *Ham* or *Ross* indicated a decision by this Court on the merits of the question of retroactivity.[1]

[1] The petitioners submit that if an inference were to be drawn from this Court's judgment in *Ross*, *supra*, it is that, had this Court pronounced a new constitutional mandate to be applied retroactively, *Ross* would have been reversed outright. Vacation of judgment and remand for reconsideration suggests that *Ham* indeed was limited to its facts.

The rule enunciated in *Ham* should not be given retroactive effect. On January 21, 1975, this Court ruled in *Taylor* v. *Louisiana*, U.S. , 43 L.W. 4167, that the Louisiana jury selection system, whose operation resulted in very few women being called for jury service, violated a defendant's Sixth and Fourteenth Amendment right to an impartial jury trial. The defendant's conviction was reversed. On January 27, 1975, this Court considered on appeal the case of *Daniel* v. *Louisiana*, U.S. (Slip Opinion dated January 27, 1975), raising the same issue as decided by the Court in *Taylor*, *supra*. The Court held, " . . . *Taylor* is not to be applied retroactively, as a matter of federal law, to convictions obtained by juries empanelled prior to the date of that decision."

That *Taylor* involved the Sixth as well as the Fourteenth Amendment does not present a substantial basis for differentiating in the effect to be accorded *Taylor* and *Ham*. Both cases address the issue of a defendant's right to be tried by an impartial jury; the purpose or function of the rule enunciated in each case is to prevent arbitrary and repressive action, and to guarantee to a defendant the type of fact finder to which he is constitutionally entitled.

This Court based its decision in *Daniel*, *supra*, on *DeStefano* v. *Woods*, 392 U.S. 631 (1968), holding *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), to be applicable only prospectively. In both instances this Court considered as factors affecting the judgment whether a case substantially revising prior doctrines should be applied only prospectively: (1) the purpose to be served by the new standards, (2) the extent of reliance by law enforcement authorities on the old standards, and (3) the effect on the administration of justice of a retroactive application of the new standards. See *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967).

The petitioners submit that the considerations which operated to require prospective application in the above cases are

present in the instant case. As in *Taylor* and *Duncan*, the rule of *Ham* is directed toward the function of the jury in the criminal justice system; to ensure impartiality and prevent arbitrariness and repression. With the exception of *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931), in which the Supreme Court, in an exercise of its supervisory powers, held that the exercise of discretion vested in the trial judge as to the questions to be put on voir dire is "subject to the essential demands of fairness," there has been no enunciation of a constitutional requirement that questions specifically addressed to the issue of racial bias must be asked on voir dire. Indeed, the courts of the Commonwealth have uniformly applied a rule directly contrary to the *Ham* case. See, *e.g.*, *Commonwealth* v. *Lee*, 324 Mass. 714, 717-718 (1949).

There was, therefore, prior to *Ham*, no basis upon which a trial judge in this Commonwealth, or in other jurisdictions, could foresee a specific constitutional rule requiring that questions directed toward the specific question of racial prejudice be put to prospective jurors in every instance.

As in *Duncan* v. *Taylor*, to hold that *Ham* be given retroactive application would result in the retrial of a significant number of persons and would have a substantial impact on the administration of criminal justice in Massachusetts and in other jurisdictions whose procedures on voir dire examination did not comport with the specific directives of *Ham*.[1]

[1] At present the following cases are pending on petitions for writs of habeas corpus in the Federal District Court for the District of Massachusetts. All involve the same issue: *Ryles* v. *Ristaino*, Civil Action No. 74-15-S; *Dukes* v. *Waitkevitch*, Civil Action No. 74-4376-T; *Bumpus* v. *Waitkevitch et al*; Civil Action No. 74-5197-G, stayed 1/9/75 in accord with *Ross*; *Williams* v. *Vinzant*, Civil Action No. 74-2640; *Daniel* v. *Vinzant*, Civil Action No. 74-2641-S. The case of *Commonwealth* v. *Lumley*, Supreme Judicial Court No. 30, is presently awaiting decision in the Supreme Judicial Court of Massachusetts.

In addition to the three-prong test considered above, the petitioners suggest that where, as here, the judgment of a state court has become final before a new procedural rule has been promulgated, principles of comity and federalism must be considered in determining retroactivity as to cases collaterally attacking a judgment upon a petition for writ of habeas corpus.

> " . . . given the fundamental place of federalism in the traditional conception of constitutional adjudication, it could certainly be strongly argued that the lower courts could properly follow the traditional due process approach until the time this Court made it clear that a particular Bill of Rights guarantee had been incorporated." *Desist* v. *United States*, 394 U.S. 244, 267 (1969) (Justice Harlan dissenting).

The petitioners submit, therefore, that if the failure of a trial judge to ask questions designed specifically to focus the attention of prospective jurors on racial prejudice is "as a matter of constitutional law" reversible error, "in fairness to trial judges, state and federal, the rule should only be so promulgated for future cases." *Ristaino* v. *Ross*, *supra*, p. 9 (Justice Moore dissenting).

Moreover, under Massachusetts procedure, a defendant may raise, by writ of error, questions whose constitutional significance was not established until after trial. *LeBlanc* v. *Commonwealth*, Mass. Adv. Sh. (1973) 325. Therefore, the retroactive application of the *Ham* case would require reversal of every case in the Commonwealth involving a defendant who was a member of a racial minority.

II. The First Circuit Court of Appeals has Erroneously Extended the Decision of this Court in Ham v. South Carolina, 409 U.S. 524 (1973), to Encompass a New and Different Factual Situation.

In *Ham*, *supra*, at 527, Mr. Justice Rehnquist stated:

> " . . . we think that the Fourteenth Amendment required the judge *in this case* to interrogate the jurors upon the subject of racial prejudice. South Carolina law permits challenges for cause, and authorizes the trial judge to conduct *voir dire* examination of potential jurors. The State having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that *under the facts shown by this record* the petitioner be permitted to have the jurors interrogated on the issue of racial bias. Cf. *Groppi* v. *Wisconsin*, 400 U.S. 505, 508 (1971); *Bell* v. *Burson*, 402 U.S. 535, 541 (Emphasis supplied.)

A. *There is a Conflict Among the Federal Circuits as to the Proper Interpretation of the Above-Cited Language.*

Five Circuit Courts of Appeal have treated *Ham* as enunciating a new constitutional requirement.[3] Each of these cases

[3] *United States* v. *Robinson*, 485 F. 2d 1157 (3d Cir. 1973); *Featherston* v. *United States*, 491 F. 2d 96 (5th Cir. 1974); *United States* v. *Ross*, 477 F. 2d 551 (6th Cir. 1973); *United States* v. *Powers*, 482 F. 2d 941 (8th Cir. 1973); *United States* v. *Robinson*, 475 F. 2d 376 (D.C. Cir. 1973) ("In *Ham* v. *South Carolina* [citation omitted] the Supreme Court recently noted the special constitutional status of *voir dire* questions designed to ferret out racial bias." At 381, fn. 8.).

dealt with a federal prosecution in the federal courts. Therefore, the supervisory requirement of *Aldridge* v. *United States*, 283 U.S. 308 (1931), as well as the requirements of the Due Process Clause of the Fourteenth Amendment, as enunciated by *Ham*, were considered.

> "Any doubts as to the mandatory requirements of the *Aldridge* rule were dispelled by the case of *Ham* v. *South Carolina* [citation omitted]. . . . The Supreme Court emphasized that the right to have the judge make inquiry on voir dire as to racial prejudice was one of constitutional dimensions." *United States* v. *Robinson*, 485 F. 2d 1157, 1159 (3d Cir. 1973).

The Ninth Circuit, however, limits *Ham* to its facts. Discussing the limited application of *Ham* and *Aldridge* to special circumstances, the Ninth Circuit stated:

> "*Aldridge* and *Ham* are distinguishable. In *Aldridge* a black man was charged with the murder of a white policeman. All the jurors were white. Recognizing that the trial court has 'a broad discretion as to the questions to be asked', the Court held that the exercise of this discretion is 'subject to the essential demands of fairness' and that under the circumstances of that case the court erred in failing to permit counsel to ask questions relative to 'racial prejudice.' 283 U.S. at 310-311, 51 S. Ct. at 471. *Ham* involved the prosecution of a black civil rights leader for possession of drugs. 'His basic defense at the trial was that law enforcement officers were "out to get him" because of his civil rights activities, and that he had been framed on the drug charge.' 409 U.S. at 525, 93 S. Ct. at 849. Following *Aldridge* the Court again recognized 'the tradition-

ally broad discretion accorded to the trial judge in conducting *voir dire*', 409 U.S. at 528, 93 S. Ct. at 851, but held that *under the facts shown by the record* the jurors should have been interrogated on 'the issue of racial bias.' *id.* at 527, 93 S. Ct. 848." (Emphasis supplied.) *United States* v. *Walker*, 491 F. 2d 236, 239 (9th Cir. 1974).

The Second Circuit has avoided resolution of the issue by holding that failure to ask a question directed to racial bias was, if error, harmless beyond a reasonable doubt in view of overwhelming evidence. *United States* v. *Grant*, 494 F. 2d (2d Cir. 1974).

The Seventh Circuit in *United States* v. *Booker*, 480 F. 2d 1310 (7th Cir. 1973), addressed the issue in a federal prosecution and held that *Aldridge, supra,* was controlling. However, the court did state:

"For that reason reversal need not rest on a constitutional ground. It is nevertheless significant that a unanimous Supreme Court recently reversed a state judgment because the trial judge refused to ask prospective jurors about possible prejudice against black people. [Citation omitted.] There was perhaps a greater risk of prejudice against Ham because of his participation in civil rights activities than against the appellant in this case, but the Court's appraisal of the error as violative of the 'essential demands of fairness' protected by the Due Process Clause, 409 U.S. at 526 . . . persuades us that on direct review of a federal conviction we should reverse without attempting to appraise the actual likelihood of prejudice to this appellant." *United States* v. *Booker*, at 1311.

Therefore, petitioners submit there is conflict and uncertainty among the federal circuits as to the application and effect of the *Ham* decision.

Although the instant case is the only case in which a federal court of appeals has ruled on the application of *Ham* to a state court proceeding, it is fair to say that the issue will be raised in a substantial number of cases, not only in District Court of the District of Massachusetts[4], but in other jurisdictions which have taken a position similar to that of the Supreme Judicial Court of Massachusetts.[5]

Moreover, the decision of the First Circuit does not effectively resolve the question of the proper interpretation of *Ham*. The First Circuit, while on one hand conceding that the *Ham* opinion "did not explicitly state that whenever a black defendant requests the trial judge to inquire specifically on the issue of racial prejudice on voir dire the trial judge must do so" (App. A.,), interprets and, we suggest, extends the *Ham* decision to require reversal of every case in which the "charges against the defendant involved violence against a white" and the trial judge declined to address specific questions directed to the issue of racial prejudice to the prospective jurors. Thus, the Court of Appeals has, in effect, ruled that *Ham* is not limited to the facts of that case, *i.e.*, where the defendant, a well-known civil rights worker, whose "defense at the trial was that law enforcement officers were 'out to get him' because of his civil rights activities, and that he had been framed on the drug charge" (*Ham*, *supra*, at 525), but does enunciate a broad new constitutional requirement. The petitioners submit that such an interpretation is erroneous.

[4] See footnote 2, cases presently pending in the Federal District Court.

[5] Cf. *Commonwealth* v. *Brown*, 228 Pa. Super. 166, 323 A. 2d 281 (1974) (conviction of forcible rape affirmed by 3 to 2 vote; requested racial questioning; held irrelevant and overbroad.)

B. The Ham Decision is Limited to Special Circumstances Involving Racial Prejudice.

The petitioners submit that this Court in *Ham* quite precisely limited its decision to the "facts shown on this record."[6] The Supreme Judicial Court in *Ross* v. *Commonwealth*, *supra*, properly reconsidered the factual situation in *Ross* and determined that, as opposed to *Ham*, nothing pointed to *Ross* as a special target for racial prejudice.[7]

> "We hold, therefore, that the *Ham* decision does not, in this case, dictate that the trial judge was constitutionally required to question prospective jurors specifically concerning their possible racial prejudices beyond the comments and questions that were put to them. While the due process clause of the Fourteenth Amendment requires the States to ensure the essential demands of fairness in criminal trials, we believe that the judge's refusal to ask specific questions designed to discover racial prejudice of the veniremen did not, in this case, violate the defendant's right to the demands of fairness." Mass. Adv. Sh. (1973) at 846. (App. C.)

[6] The petitioners submit that the language in the opinion does not reflect mere "common judicial locutions" but means what it says.

[7] In fact the record reflects that the trial judge, in lobby conference, inquired of the defense attorneys whether there was something peculiar to the case or circumstances which they would like to put on the record. An attorney for a codefendant replied, "No, just the fact that the victim is white and the defendants are black" (App. C). The attorney for *Ross* did not bring any other special circumstances to the trial judge's attention.

C. If Ham is Considered as Limited to its Facts, the First Circuit Court of Appeals Erred in Granting Habeas Corpus Relief.

The scope of voir dire is within the discretion of the trial judge. "In accordance with the existing practice, the questions to the prospective jurors were put by the court, and the court had a broad discretion as to the questions to be asked." *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931). The discretion of the trial judge in Massachusetts is limited both by Mass. Gen. Laws, c. 234, § 28, requiring examination of four areas of potential prejudice upon motion of either party,[8] and by the "essential demands of fairness" required by the Due Process Clause of the United States Constitution. The decision of the trial judge should not be set aside by a reviewing court in a collateral proceeding absent a showing of manifest error. *Reynolds* v. *United States*, 98 U.S. 145 (1878) (quoted with approval in *Irvin* v. *Dowd*, 366 U.S. 717 (1961)). *Ham*, *supra*, left unaltered the manifest error standard of *Reynolds*. Therefore, the petitioner in the court below had the burden of proving manifest error and, we submit, failed to sustain that burden.

[8] There is no question that the trial judge fully explored these areas. In fact, the Federal District Court in granting the writ stated:

> "The questions propounded to the jurors in the present case were directed to the general issue of bias and prejudice, and were far more extensive and carefully worded than those given in *Aldridge* and *Ham*. They were exemplary in every respect, except the failure to specifically direct the attention of the jurors to the issue of racial prejudice." (App. B).

III. An Error with Respect to the Procedure Employed upon Voir Dire Questioning does Not, as a Matter of Constitutional Law, Necessarily Require Reversal.

The trial judge in the instant case asked all prospective jurors the statutory questions required under Mass. Gen. Laws, c. 234, § 28.

Within this Commonwealth, it has been held historically that it is within the discretion of the trial judge whether or not to broaden the scope of the voir dire. *Commonwealth* v. *Gee*, 6 Cush. 174 (1850); *Commonwealth* v. *Geagan*, 339 Mass. 487 (1959), cert. denied sub nom. *Geagan* v. *Massachusetts*, 361 U.S. 895 (1959).

In addition to posing the statutory questions to the venire the trial judge repeatedly directed the jury and the venire to the question of their sensitivity to any bias or prejudice.

> "Can you under oath return a fair and impartial verdict based upon the evidence that you hear in the courtroom and not on any extraneous factors; no bias or prejudice or personal interest in the case, and no prejudice of any kind." (Tr. 494.)

During the voir dire, every pool of prospective jurors was similarly instructed. All veniremen were instructed to raise their hands to bring to the attention of the court all questions of conscience. Two jurors were dismissed for cause when, upon questioning, the court determined they were unable to return a fair and impartial verdict because of racial prejudice (Tr. 440-441, 464).

These instructions and questions insured that, as far as is possible, an impartial jury satisfying the "essential demands of fairness" was impaneled. The opinion of the Supreme Judicial

Court in *Commonwealth* v. *Ross*, *supra*, 842-845, details the extent to which the trial judge endeavored to secure an impartial jury.

> "Although the judge declined to ask the veniremen whether they were prejudiced against black people, he decided, 'in the interest of good sense,' not to mention the defendants' Muslim names appearing on the indictments, but only to refer to them as Ross, Daniels and Williams. The judge carefully weighed the likelihood of discovering bias by means of questions concerning race prejudice and came to the conclusion that it would be most unusual for such questions to reveal any such prejudice. He explained to the veniremen with clarity that they must let the court know if for any reason they could not try the case impartially, without bias or prejudice or if they had already formed an opinion. He pointed out that 'your oath requires . . . that any verdict that you return must be a fair and impartial verdict based upon the evidence and not based upon any extraneous factors, not based upon any bias or prejudice or preconceived notion or any other experience factor.' The veniremen were told that they must raise their hands '[i]f, for any reason, you conclude that you cannot render a fair and impartial verdict, or if you doubt whether you can render a fair and impartial verdict.'
>
> "It is clear that at least one of the prospective jurors understood that the questions put to him about his prejudice or bias included race prejudice. The defendants were asked to stand up so that the veniremen could see them. The clerk then asked the veniremen the questions outlined by the judge and various other questions previously explained to them but not in dispute here. In answer to the clerk's questions, several prospective jurors raised their

hands to indicate possible bias. Those who indicated that they might be biased, prejudiced or had already formed an opinion of the defendants' guilt were then questioned individually by the judge. One prospective juror was excused because of admitted racial prejudice and two were excused for an unspecified prejudice. Seven prospective jurors were excused because they had already formed an opinion, seven were excused because of connections with police work, and one was excused because of his affiliation with the university where the alleged crimes occurred. The final composition of the jury of twelve was ten white persons and two black persons." (Footnotes omitted.)

The federal District Court concurred with the Supreme Judicial Court in finding that the trial court conducted the voir dire in a careful and conscientious manner:

> "The questions propounded to the jurors in the present case were directed to the general issue of bias and prejudice, and were far more extensive and carefully worded than those given in *Aldridge* and *Ham*. They were exemplary in every respect, except the failure to specifically direct the attention of the jurors to the issue of racial prejudice." (Memorandum and Order, App. p. 17.)

The First Circuit Court of Appeals concurred with this characterization of the trial court's efforts, but held that failure to specifically address a question designed to elicit racial prejudice required that the writ of habeas corpus issue.

The petitioners submit that the failure to ask the specific questions under the circumstances of the instant case does not

constitute an error of constitutional dimension. In order to demonstrate a denial of fundamental fairness, the unfairness complained of must be of such degree as necessarily prevents a fair trial. *Lisenba* v. *California*, 314 U.S. 219, 236 (1941). However, under the circumstances of this case, it is sheer speculation to conclude that the attention of the jurors was not focused on the racial overtones of the case, especially in view of the fact that at least one prospective juror was excluded because of admitted racial prejudice. Mere speculation as to the possibility of unfairness does not constitute error of constitutional dimension.

> " . . . the burden of showing essential unfairness [must] be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality." *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281 (1942).
>
> "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." *Holt* v. *United States*, 218 U.S. 245, 251 (1910).

The petitioners submit that on a collateral attack upon a final state court judgment a federal court may interfere only where the alleged error is so conspicuous and substantial as to result in a constitutionally unfair trial.

> "It is only where criminal trials in state courts are conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice that due process is offended and that federal court interference is warranted." *Chavez* v. *Dickson*, 280 F. 2d

727, 735 (9th Cir. 1960), cert. denied, 364 U.S. 934 (1961).

Therefore, where the trial judge's conduct on voir dire is exemplary and complies with the essential demands of fairness, reversal by the federal court is unwarranted.

Conclusion.

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the First Circuit Court of Appeals.

Respectfully submitted,

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Appendix A.

United States Court of Appeals
For the First Circuit

No. 74-1222

THEODORE RISTAINO ET AL.,

RESPONDENTS, APPELLANTS,

v.

JAMES ROSS, JR.,

PETITIONERS, APPELLEES,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
MCENTEE, *Circuit Judge*, and MOORE,*
Senior Circuit Judge.

Dennis J. LaCroix, Deputy Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, and *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Division, were on brief, for appellants.

Michael G. West, by appointment of the Court, with whom *Kamberg, Berman & Hendel, P.C.* was on brief, for appellee.

December 31, 1974

MCENTEE, *Circuit Judge*. We are required in this case to decide whether it was a denial of due process, where the defendant was a black man accused of violent crimes against a white security officer, for a state court judge to deny a defense request to interrogate prospective jurors specifically on the issue of racial prejudice.[1]

* Of the Second Circuit sitting by designation.

[1] The defendant's motion for examination of proposed jurors asked that various questions be put to the *voir dire* panel. The question which this litigation involves was "Are there any of you who believe that a white person is more likely to be telling the truth than a black person?"

The Commonwealth of Massachusetts appeals from a memorandum and order entered by the district court granting a writ of habeas corpus to appellee, who was convicted of armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder. The Massachusetts Supreme Judicial Court unanimously affirmed these convictions, *Commonwealth* v. *Ross,* 1972 Mass. Adv. Sh. 873, 282 N.E.2d 70, but the United States Supreme Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of *Ham* v. *South Carolina,* 409 U.S. 524 (1973). *Ross* v. *Massachusetts,* 410 U.S. 901 (1973). On remand the Supreme Judicial Court held that *Ham* did not affect the result reached in its earlier deliberation, *Commonwealth* v. *Ross,* 1973 Mass. Adv. Sh. 839, 296 N.E.2d 810.[2] Ross sought a writ of habeas corpus from the district court, which the court granted, saying:

> "The questions propounded to the jurors in the present case were directed to the general issue of bias and prejudice, and were far more extensive and carefully worded than those given in *Aldridge* [v. *United States,*

[2] After the decision of the Massachusetts Supreme Judicial Court on remand, Ross again filed a petition for certiorari with the United States Supreme Court. The Court denied the petition, *Ross* v. *Massachusetts,* 414 U.S. 1080 (1973), but Justice Marshall filed an opinion, in which Justices Douglas and Brennan joined, dissenting from the denial. This part of the procedural history of this case has no legal effect in this court. The denial of a petition for certiorari from a state court judgment affirming a conviction has no legal significance when an application for a writ of habeas corpus thereafter comes before a district court. *Brown* v. *Allen,* 344 U.S. 443, 488-97 (1953) (opinion of Justice Frankfurter, for a majority of the Court). That only three Justices voted to grant Ross's second petition for certiorari does not mean that five or more Justices were voting, or even would have voted, to affirm on the merits the decision of the Massachusetts Supreme Judicial Court on remand. That the three dissenting Justices filed a lengthy opinion with the denial of certiorari does not reverse the effect to be accorded the denial; the opinion only indicates how strongly those Justices feel about the case. Denial of certiorari may be motivated, among other reasons, by a desire "to have different aspects of an issue further illumined by the lower courts," *Maryland* v. *Baltimore Radio Show, Inc.,* 338 U.S. 912, 918 (1950) (opinion of Justice Frankfurter respecting denial of certiorari), or by a preference for administrative reasons to have the prisoner seek habeas corups in the district court. *See generally* R. Stern & E. Gressman, Supreme Court Practice §§ 5.4-5.7 (4th ed. 1969).

283 U.S. 308 (1931),] and *Ham*. They were exemplary in every respect, except the failure to specifically direct the attention of the jurors to the issue of racial prejudice. In substance, they were no different than the ones given in *Ham*. The fact that one juror responded that he suffered from racial prejudice and was excused does not cover the situation, because his perception cannot be imputed to the twelve who were chosen.

> "In the instant case, there was a white victim. The offense in *Ham* was victimless, i.e., possession of marijuana. The likelihood of infection of the verdict was at least as great as it was in *Ham*. . . . The petitioner had a constitutional right to have the issue of racial prejudice specifically called to the attention of the prospective jurors on the *voir dire* examination."

In *Ham* v. *South Carolina, supra,* the defendant was a black civil rights leader charged with possession of marijuana. His defense was that the police were out to get him and were framing him on the drug charge. His counsel requested the judge to ask on *voir dire* two questions designed to ferret out any possible racial prejudice against the defendant.[3] The judge did put three general questions to the prospective jurors on the issue of bias, but he refused to ask any question directed specifically to racial prejudice. The Supreme Court, in a unanimous opinion, held "that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice." 409 U.S. at 527. The contours of the *Ham* decision were not sharply defined by the Court. Justice Rehnquist's opinion

[3] The two questions sought to be asked were:

> "1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?
>
> "2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'?" 409 U.S. at 525 n. 2.

did not explicitly state that whenever a black defendant requests the trial judge to inquire specifically on the issue of racial prejudice on *voir dire* the trial judge must do so. Nor did the opinion explicitly state that the defense request for specific questions directed to racial prejudice need only be honored where the defendant was a civil rights leader or other "special target of racial prejudice,"[4] which was the construction the Supreme Judicial Court gave *Ham*.[5] *Commonwealth* v. *Ross*, 1973 Mass. Adv. Sh. 839, 296 N.E.2d 810.

Under the view we take of the facts in this case, however, we are not required to resolve this ambiguity. In *Ham* the defendant was a civil rights leader, while in this case the black defendant is for the purpose of this inquiry an ordinary black citizen. But in this case, the charges against the

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[4] If a juror were prone to racial bias, we question whether it is reasonable to conclude that he would confine that bias, and its destructive effects on his impartiality, to cases where the defendant was a civil rights leader. That the juror might be particularly prone to vent his bias in such a case in no way supports the conclusion that he would be an impartial juror in the absence of such a special factor, as the due process clause requires, *see Peters* v. *Kiff*, 407 U.S. 493, 501 (1972) (opinion of Justice Marshall).

[5] Other state cases suggest any black criminal defendant, target or not, who requests a specific inquiry about racial prejudice is entitled to it. *Cochran* v. *State*, 505 S.W.2d 520 (Ark. 1974) (prosecution for assaulting an officer during an assemblage or riot); *McNichols* v. *State*, 279 So.2d 377 (Fla. App. 1973) (state confessed error; facts not stated); *Mize* v. *State*, 131 Ga. App. 538, 206 S.E.2d 530 (1974) (black defendant charged with simple battery against white prosecutrix entitled to question on racial prejudice); *Reid* v. *State*, 129 Ga. App. 657, 200 S.E.2d 454 (1973) (error not to allow black woman charged with theft to have questions concerning racial bias); *People* v. *Wray*, 49 Mich. App. 344, 212 N.W.2d 78 (1973) (black defendant charged with carrying concealed weapon in motor vehicle entitled to question all-white jury on racial bias); *Shabazz* v. *State*, 506 S.W.2d 60 (Mo. Ct. App. 1974) (dictum); *People* v. *Rubicco*, 42 App. Div. 2d 719, 345 N.Y.S.2d 624 (2d Dept. 1973), *aff'd on another ground*, 34 N.Y.2d 841, 316 N.E.2d 344, 359 N.Y.S.2d 62 (1974) (possession of gambling records; "reversible constitutional error" to deny motion to ask jurors whether they are biased against Italians); *People* v. *Williams*, 41 App. Div. 2d 611, 340 N.Y.S.2d 504 (1st Dept. 1973) (narcotics convictions reversed because of "direct conflict with . . . *Ham*"). *But see United States* v. *Walker*, 491 F.2d 236 (9th Cir.), *cert. denied*, 416 U.S. 990 (1974) (prosecution for uttering forged U. S. treasury check; inquiry about racial prejudice not mandated because no racial overtones shown); *Commonwealth* v. *Brown*, 228 Pa. Super. 166, 323 A.2d 281 (1974) (conviction for forcible rape affirmed by 3 to 2 vote; requested racial question held irrelevant and overbroad).

defendant involved violence against a white, not a victimless crime like possession of marijuana. Moreover, the white victim, a security officer at Boston University, had a status close to that of a police officer. In addition, the eyewitness testimony of a white gas station attendant was a major part of the state's case against Ross. On these facts the district court was not in error in concluding that "[t]he likelihood of infection of the verdict [by racial prejudice] was at least as great as it was in *Ham*." In effect, the court held that a black defendant charged with violent crimes against a white security officer would be likely to be a special target of racial prejudice.

Our dissenting brother suggests that the rule of *Ham* should only apply to cases brought to trial after the date *Ham* was decided. However, we do not feel the writ should be denied on the ground that *Ham* should not be given retroactive application. The Supreme Court implicitly decided that *Ham* applied to this case when it summarily vacated the judgment of the Supreme Judicial Court of Massachusetts and remanded the case to that court for reconsideration in light of *Ham*. *See Ross* v. *Massachusetts*, 410 U.S. 901 (1973).

It is not a significant distinction between this case and *Ham* that Ham took the stand and put his credibility in issue, while Ross did not take the stand. If a juror is prejudiced against blacks, he would not be able to appraise the defense offered by the black defendant impartially, whether or not that defense included the defendant's taking the stand. Nor is it particularly relevant that the trial court here doubted that questions directed to discovering racial prejudice would result in any admissions of bias. This objection would apply equally well to other questions the court is required to put to proposed jurors. *See* Mass. Gen. Laws Ann. c. 234, § 28 (Supp. 1974). For example, a pro-

posed juror biased by pretrial publicity might aver he is not biased or a juror who believes anyone indicted is guilty as charged might answer that he believes the defendant is innocent until proven guilty, yet we do not allow the possibility of a false answer to serve as an excuse for not asking these questions.

By deciding in this case that the trial judge should have questioned the proposed jurors specifically on the question of racial prejudice, we do not hold that he had to ask the specific questions sought by Ross's counsel. "[T]he trial judge was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner." *Ham* v. *South Carolina, supra,* at 527. *See Featherston* v. *United States,* 491 F.2d 96 (5th Cir.), *cert. denied,* 94 S.Ct. 3176 (1974). The trial judge has broad discretion as to the questions be asked regarding racial prejudice.[6]

The writ of habeas corpus shall issue unless within 90 days from the date of this opinion the Commonwealth has either instituted proceedings to retry the petitioner or applied for a writ of certiorari. If certiorari is sought and granted, the issuance of the writ of habeas corpus shall be stayed pending further order of the Supreme Court. If certiorari is sought and denied, the writ of habeas corpus shall issue unless the Commonwealth has instituted proceedings to retry the petitioner within 30 days after the date certiorari is denied.

So ordered.

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[6] We observe with respect to our brother's dissenting opinion that whenever trial judges are vested with broad discretion it is possible to evoke Pandora, but only if one assumes that discretion will be thrown to the winds. As for this and the other points made, we come to rest with the conviction that they would apply equally to the case presented in *Ham*.

MOORE, *Circuit Judge* (Dissenting). The sole issue on this appeal relates to the *voir dire* examination of prospective trial jurors during which the trial judge denied a specific request on behalf of the petitioner, Ross, to ask a particular question, accurately stated by the majority as follows: "Are there any of you who believe that a white person is more likely to tell the truth than a black person?" No question was sought by Ross' counsel addressed to prejudice against Ross as a black. Other questions addressed to prejudice against blacks were requested by co-defendants not involved on this appeal. In my opinion the request of Ross' counsel cannot be given the broad interpretation that the majority has given in saying that it was "a defense request to interrogate prospective jurors specifically on the issue of racial prejudice."

The majority hold, as did the District Court, that the failure of the trial judge to question "the proposed jurors specifically on the question of racial prejudice" amounted to a denial of constitutional due process. In so holding, they rely primarily on the recent Supreme Court decision in *Ham* v. *South Carolina,* 409 U.S. 524 (1973), although they concede that the *Ham* opinion "did not explicitly state that whenever a black defendant requests the trial judge to inquire specifically on the issue of racial prejudice on *voir dire* the trial judge must do so."

If the District Court be correct in saying that "The petitioner had a constitutional right to have the issue of racial prejudice specially called to the attention of the prospective jurors on the *voir dire* examination." and *if* it was a "denial of due process" of constitutional dimension to deny a defense request to interrogate prospective jurors specifically on the issue of racial prejudice and *if* the District Court had no choice but to enter the order granting the writ of habeas corpus because "The mandate of *Ham* is so

clear . . .", then, in my opinion, Pandora's box of potential evil has indeed been opened wide and I look with Cassandra-like foreboding upon the future of the *voir dire* jury examination in cases involving black defendants.

Starting with the question, which the majority quite accurately states this litigation involves, "Are there any of you who believe that a white person is more likely to be telling the truth than a black person?", I find no relation between such a question and the ultimate desideratum, namely, to uncover racial prejudice against a black defendant. Such a question could not be properly answered unless prosecution and defense read to the prospective juror the name and color of all witnesses they intended to call. Even then it would be impossible to obtain a juror's pre-trial commitment as to a witness' credibility until the particular witness had been seen and heard. Will it be constitutionally impermissive to deny interrogation as to a prospective juror's feelings as to the credibility of a witness of the "X" race, nationality or religion? Illustrative of the problem are questions proposed by petitioners' co-defendants:

> "18. Do you have any feelings either for or against persons of the Black race who wear the Afro style haircut and long sideburns?" (App. p. 56) or
>
> "7. Do you feel that this increase (in crime) is due primarily to blacks in the city?" and
>
> "12. Do you object to the number of blacks and Puerto Ricans on the welfare rolls in the city?" (App. p. 58.)

The other forty questions sought to be asked by these co-defendants were undoubtedly intended in good faith by counsel to ferret out the more intimate prejudices of the panel which was to pass judgment on their clients but query, did not the state trial judge probe sufficiently deeply, as a practical matter, in inquiring "Can you under oath return

a fair and impartial verdict based upon the evidence that you hear in the courtroom and not upon any extraneous factors; no bias or prejudice or personal interest in the case, and no prejudice of any kind." (App. p. 494.)

Petitioner argues that the state judge's failure to focus the attention of the prospective jurors as to any racial prejudice they might entertain is "as a matter of constitutional law" reversible error. If this is to be the rule by judicial legislation, in fairness to trial judges, state and federal, the rule should only be so promulgated for future cases.

The District Court concedes that the questions propounded on the general issue of bias and prejudice were exemplary in every respect "except the failure to specifically direct the attention of the jurors to the issue of racial prejudice." However, if there are to be rules they should be clear and capable of objective application. In other words, it is easy to understand and apply a rule which requires a trial judge in every case in which there is a black defendant to inquire of each individual juror whether he would be adversely prejudiced against such a person because of his race. But is the trial judge duty bound to ask such a question in the absence of a request? If he asks the question *sua sponte*, the appeal in all probability will be on the ground that he injected the racial issue into the case — hence reversible error. If he fails to ask the question, the same result will obtain and, if counsel fails to make the request, incompetence of counsel will be the charge on the habeas corpus application.

The importance of appellate pronouncements in the field of trial procedure is because of the guidance they should give to trial judges. What are we telling the trial judge as to how he should conduct the *voir dire* on the next trial so as to avoid constitutional error?

A "next" trial can be assumed. Only a few years have

elapsed since the first trial. The witnesses and their whereabouts in all probability are known. The facts supporting guilt as found on the first trial may be read in the two opinions of the Massachusetts Supreme Judicial Court.[7] But juries, not courts, are to determine guilt or innocence and the method of selection of the jury will be the most important element initially.

Neither *Aldridge*,[8] *Ham, supra*, the District Court opinion nor this court's opinion will be of real value as guidelines. *Aldridge* and *Ham* indicate that questions regarding racial prejudice must be asked. And, although *Ham* and the majority state that the questions need not be "in any particular number" or form, *Ham*, at 527, only an appellate court will be able to decide whether the future trial judge will have properly exercised that "broad discretion" with which appellate courts so liberally endow him.

If the courts are satisfied to accept "No" to the single question "Are you prejudiced against blacks?" and this colloquy is considered to be constitutionally sufficient, such a question should be permitted if counsel should choose to request it. But the courts are not so easily satisfied — and probably properly so. Few jurors will reveal the innermost workings of their minds — particularly in public. The mere "obtaining jurors' assurances of impartiality is insufficient [to test that impartiality]."[9] The courts have said that a prospective juror's eligibility "should not be adjudged on that juror's own assessment of self-righteousness *without something more*."[10]

It is all very well to speak of a standard to be used in

[7] *Commonwealth* v. *Ross*, 282 N.E.2d 70 (1972) and 296 N.E.2d 810 (1973).

[8] *Aldridge* v. *United States*, 283 U.S. 308 (1931).

[9] *United States ex rel Bloeth* v. *Denno*, 313 F.2d 364 at 372 (2nd Cir. 1963), *cert. denied*, 372 U.S. 978.

[10] *Silverthorne* v. *United States*, 400 F.2d 627, 639 (9th Cir. 1968). (Emphasis in original).

the exercise of discretion in passing upon requested inquiries as meeting "the essential demands of fairness." *Aldridge, supra,* at 310 but, what these demands may be, will only be known to the trial judges years later in the opinion of some appellate court.

Take for example a single instance derived from this case because it falls into the category of the "something more" field of inquiry. A proposed question submitted to the trial judge here followed the questions: "Do you have children? Do they go to public schools?" and was:

> "16. If in private schools, is this a result of your feelings towards the number of blacks and Puerto Ricans in the school system?"

In view of certain situations recently reported in the public press existing in Eastern Massachusetts with respect to the public schools such a question might well be included in a probing group, including "Are you at all nervous about walking the streets of your town or city after dark?" Almost unlimited questions along this line can be conjured up for obtaining a true picture of the potential juror's mind. To obtain such a picture the *voir dire* might well more properly be relegated to the psychiatrist.

However, our present concern must be this case. We are given some 120 pages of transcript devoted entirely to the trial judge's efforts to obtain an impartial jury. Successive panels were interrogated. The defendants who are black stood before the prospective jurors. The trial judge was most specific as to "bias or prejudice" generally. The jurors knew when asked about prejudice that the defendants were black. Each juror was given an opportunity to approach the Bench and express whatever his own personal reasons for not wishing to serve. Any possible reluctance to express racial bias or prejudice in public was thus avoided. In fact two jurors were excused because of preju-

dice; one in particular, because of racial prejudice. The ultimate jury consisted of 10 whites and 2 blacks. No incident has been pointed out to us which might indicate that this was not a normal and average American jury which heard the evidence and reached their verdict thereon. If there is to be a new *voir dire* rule, mandating upon request the injection of a racial prejudice issue into the case, I am not prepared to fault the trial judge for not knowing it before it was promulgated.

Finally, I am not unmindful of the fact that a distinguished court (the Massachusetts Supreme Judicial Court) has twice passed upon the issue of fair trial for this defendant. After the first affirmance certiorari was granted and the case remanded for reconsideration in light of *Ham*. That reconsideration was given and again there was affirmance. Certiorari was denied, three Justices vigorously dissenting, as appears in the opinion of Mr. Justice Marshall. 414 U.S. 1080.

The Supreme Court has stated that denial of certiorari has no legal significance — at least as to the merits of the controversy. Nor would I question the sound philosophy behind such an interpretation. Two cases in particular in which the opinions were written by Mr. Justice Frankfurter clearly demonstrate that "such a denial (of certiorari) carries with it no implication whatever regarding the Court's views on the merits of the case which it has declined for review." *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 918 (1950). Again in 1953 the Supreme Court devoted itself in *Brown* v. *Allen*, 344 U.S. 443 (1953), to the effect, if any, which might be attributed to denial of certiorari. In a separate opinion (pp. 488-497) Mr. Justice Frankfurter set forth most specifically the reasons why no effect should be given to denial. The many instances cited of petitions "rarely drawn by lawyers," "almost unintelligible,"

inadequate records, no clear statements of the issues, the lack of importance of the issues, the mere numerical quantity of the petitions, all justify the conclusion that "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, . . ."[11] Quite rightly did the Justice say: "The reasons why our denial of certiorari in the ordinary run of cases can be any number of things other than a decision on the merits are only multiplied by the circumstances of this class of petitions." *Brown, supra,* at 497. However, this very expression is pregnant with the possibility as Mr. Justice Jackson pointed out in his separate opinion that "There may be circumstances so extraordinary that I do not now think of them which would justify a departure from this rule, but the ordinary run-of-the-mill case certainly does not." *Brown, supra,* at 545.

This small opening in an otherwise seemingly impregnable fortress entitles one to peer into the interior — a hypothetical conference chamber in which consideration of certiorari in this case is being discussed. *Ham* for all practical purposes had just been decided. The constitutional issue of the "black" question presented by *Ross* was so clear that a remand was directed in light of *Ham*. When *Ross* next arrived it was in the same garb — no other questions, no procedural issues, no diminution in importance of the only issue — just the same single "black" question. If there were any doubt on the subject Mr. Justice Marshall must have made all conscious of the singleness of the issue in his dissent, Justices Douglas and Brennan joining. Under these circumstances I would be reluctant to characterize this case as an "ordinary run-of-the-mill case." The intervening remand had not created a new issue. If the absence of the "black" question called for remand on the

[11] *United States* v. *Carver*, 260 U.S. 482, 490 (1923).

first petition, its continued absence must have been noted on the second. Very possibly the denial of the *Ross* second certiorari petition has no legal significance but in my opinion the scope and intent of *voir dire* in the specific field of bias and prejudice as presented here has great legal significance. If counsel are permitted to endeavor to obtain via the *voir dire* a juror's commitment as to his views of prospective witnesses' credibility I foresee countless future appeals arising therefrom.

For these reasons — but primarily because I believe that the petitioner received a fair trial in Massachusetts — I dissent and would reverse the granting of the writ.

United States Court of Appeals for the First Circuit.

No. 74-1222.

JAMES ROSS, JR.,
PETITIONERS, APPELLEES,

v.

THEODORE RISTAINO ET AL.,
RESPONDENTS, APPELLANTS.

JUDGMENT

Entered December 31, 1974

The order of the district court is affirmed with the following directions: That court is directed to issue the writ of habeas corpus unless within 90 days from the date of this judgment the Commonwealth has either instituted proceedings to retry the petitioner or applied for a writ of certiorari. If certiorari is sought and granted, the issuance of the writ of habeas corpus shall be stayed pending further order of the Supreme Court. If certiorari is sought and denied, the writ of habeas corpus shall issue unless the Commonwealth has instituted proceedings to retry the petitioner within 30 days after the date certiorari is denied. No Costs.

By the Court:

Clerk.

Appendix B.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

JAMES ROSS, JR., Petitioner,	•	
v.	•	CIVIL ACTION No. 74-15-S
THEODORE RISTAINO et al., Respondents.	•	

MEMORANDUM AND ORDER

June 24, 1974

SKINNER, D.J.

Petitioner was convicted of armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder. Petitioner is black, and the victim, a security guard at Boston University, is white. At the trial, petitioner's counsel asked the judge to put the following question to the jurors in the course of a *voir dire*:

> "5. Are there any of you who believe that a white person is more likely to be telling the truth than a black person?"

Counsel for co-defendants asked for other questions directed to the issue of racial prejudice.

The trial judge declined to ask the requested questions, but did give instructions and ask questions of the jurors which dealt meticulously and extensively with the general issue of bias and prejudice, but did not specifically direct the jurors' attention to the possibility of racial prejudice. The defendant had been identified to the jurors. Two of the jurors asked to be excused because they were prejudiced. One stated explicitly that the prejudice which he entertained was racial. The other's prejudice was not identified. Various other jurors were excused because of preconceived opinions and connections with the police or with Boston University.

On appeal to the Supreme Judicial Court of Massachusetts, the petitioner's convictions were upheld. *Commonwealth* v. *Ross*, 1972 A.S. 873, 282 N.E. 70 (1972). The United States Supreme Court granted certiorari, vacated the judgment and remanded the case for reconsideration in the light of its decision in *Ham* v. *South Carolina*, 409 U.S. 524 (1973). *Ross* v. *Massachusetts*, 410 U.S. 901 (1973). The Supreme Judicial Court reconsidered the case and again affirmed. *Commonwealth* v. *Ross*, 1973 A.S. 839, 296 N.E. 2d 810. Ross' second petition for certiorari to the United States Supreme Court was denied, with vigorous dissents by Justices Marshall, Douglas and Brennan. *Ross* v. *Massachusetts*, 414 U.S. 1080.

In *Ham* v. *South Carolina*, *supra*, the Court held that Ham, a well-known black activist charged with possession of marijuana, was entitled to have the judge put a question to the prospective jurors specifically directed to the issue of racial prejudice. The Court relied on *Aldridge* v. *United States*, 283 U.S. 308 (1931), in which it was held that such a question was required in a trial in a federal court, as one of the "essential demands of fairness."

On remand, the Supreme Judicial Court treated *Ham* as being limited to situations in which the defendant had become a "special target" of discrimination, relying on the use by Mr.

Mr. Justice Rehnquist of such common judicial locutions as "in this case" and "under the facts shown on this record."

The *Ham* opinion rests on *Aldridge*, however, and the defendant in *Aldridge* was nobody of special notoriety prior to his indictment. The true significance of *Ham* is that it extends the rule of *Aldridge* to trials in state courts.

In *Aldridge*, the black defendant was tried for the murder of a white policeman in the District of Columbia. Defense counsel requested a *voir dire* interrogation of prospective jurors on the issue of racial prejudice, and the court refused to grant it. It was held that the "essential demands of fairness" required that such a question, in some form, be put to prospective jurors, if requested. In the opinion* Chief Justice Hughes quotes the following passage from *People* v. *Reyes*, 5 Cal. 347, 349.

> "As the juror best knows the condition of his own mind, no satisfactory conclusion can be arrived at, without resort to himself. Applying this test then, how is it possible to ascertain whether he is prejudiced or not, unless questions similar to the foregoing are propounded to him."

The questions propounded to the jurors in the present case were directed to the general issue of bias and prejudice, and were far more extensive and carefully worded than those given in *Aldridge* and *Ham*. *They were exemplary in every respect, except the failure to specifically direct the attention of the jurors to the issue of racial prejudice.* In substance, they were no different than the ones given in *Ham*. The fact that one juror responded that he suffered from racial prejudice and was

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* At 283 U.S. 313.

excused does not cover the situation, because his perception can not be imputed to the twelve who were chosen.

In the instant case, there was a white victim. The offense in *Ham* was victimless, i.e., possession of marijuana. The likelihood of infection of the verdict was at least as great as it was in *Ham*. The facts are, indeed, "strikingly similar" to those in *Aldridge*. *Ross* v. *Massachusetts*, 414 U.S. 1080, 1085. ***The petitioner had a constitutional right to have the issue of racial prejudice specifically called to the attention of the prospective jurors on the voir dire examination.***

By reason of long personal experience in the prosecution of criminal cases in state courts, I am acutely aware of the burden on the courts, law enforcement officers and victims imposed when a state court conviction is set aside by a federal court. I am also conscious of the respect which federal courts owe the highest court of the state. The mandate of *Ham* is so clear, however, and the rule announced is so fundamental that I have no choice but to enter the following order:

The writ of habeas corpus shall issue unless within 120 days from the date this Order becomes final the Commonwealth shall have instituted proceedings to retry the petitioner in accordance with principles stated above.

U.S. District Judge

Appendix C.

ADVANCE SHEETS

OPINIONS OF THE SUPREME JUDICIAL COURT

Published under authority of Chapter 602 of Acts of 1935

WRIGHT & POTTER PRINTING COMPANY, 32 DERNE STREET, BOSTON

COMMONWEALTH *vs.* JAMES ROSS, JR.

Suffolk. April 2, 1973. — May 29, 1973.

Present: TAURO, C.J., REARDON, QUIRICO, KAPLAN, & WILKINS, JJ.

Practice, Criminal, Examination of jurors, Fair trial. *Constitutional Law,* Due process of law.

Rehearing by the Supreme Judicial Court pursuant to an order of the Supreme Court of the United States.

TAURO, C.J. This case is here pursuant to an order entered by the United States Supreme Court[1] granting the defendant's petition for certiorari, vacating the judgment affirming his conviction (*Commonwealth* vs. *Ross*, Mass.)[a] and remanding the case to us for further consideration in the light of *Ham* v. *South Carolina*, U. S. .[b] Thus, the only issue we must decide is whether the *Ham* decision requires that the defendant's conviction should be reversed on the ground that the trial judge refused to ask the veniremen whether they were racially prejudiced.

In the *Ham* case, the defendant's conviction for possession of marihuana had been affirmed by the South Carolina Supreme Court. The young black defendant had lived most of his life in Florence County, South Carolina, and was well

[1] Ross vs. Massachusetts, No. 72-5119, U. S. ([January 23, 1973] 41 U. S. L. Week 3103).

[a] Mass. Adv. Sh. (1972) 873.

[b] 93 Supr. Ct. Reporter 848.

known locally for his civil rights activities. He had never previously been convicted of a crime and his basic defence was that the law enforcement officers were "out to get him" because of his civil rights work. The posture of the case thus placed great emphasis on the issue of the credibility of the defendant in light of his reputation as opposed to that of the credibility of the police.

Prior to trial, Ham's counsel requested the judge to ask the prospective jurors four questions, two of which[2] sought to discover any possible racial prejudice. The judge put three general questions to the prospective jurors concerning possible bias, prejudice and partiality, as required by the State statutes,[3] but declined to ask the questions requested by the defendant.

The Supreme Court of the United States reversed Ham's conviction holding that "the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice." U. S. at .[c] Although the court's opinion stated that "the trial judge was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by . . . [the defendant]," the court decided that once the State had "created . . . [a] statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the . . . [the defendant] be permitted to have

[2] These two questions were: "1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race? 2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'?" U. S. , fn. 2 (93 Supr. Ct. Reporter 849, fn. 2).

[3] S. C. Code § 38-202 (1962). The questions were, in substance, the following: "1. Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham? 2. Are you conscious of any bias or prejudice for or against him? 3. Can you give the State and the defendant a fair and impartial trial?" U. S. , fn. 3 (93 Supr. Ct. Reporter 850, fn. 3).

[c] 93 Supr. Ct. Reporter at 850.

the jurors interrogated on the issue of racial bias." U. S. at .[d]

The defendant Ross was convicted in the Superior Court for armed robbery, assault by means of a dangerous weapon with intent to murder, and assault and battery by means of a dangerous weapon, and was sentenced to prison in the Correctional Institution at Walpole to serve three lengthy concurrent terms.

The judge denied the defendant's request to ask the prospective jurors a specific question designed to elicit possible race prejudice.[4] The three lawyers representing the defendant and the two codefendants who were tried with him[5] were concerned about the veniremen's possible prejudice in

[d] 93 Supr. Ct. Reporter at 850.

[4] The defendant requested the judge to ask the veniremen seven questions. Only one of these questions is presently before us as touching upon racial prejudice: "5. Are there any of you who believe that a white person is more likely to be telling the truth than a black person?" The defendant was tried with two other codefendants named Daniels and Williams, both of whom submitted similar questions which were also rejected by the judge. After Ross's conviction had been affirmed by this court, he filed a petition for writ of certiorari to the United States Supreme Court stating that "each defense counsel submitted motions to the judge which proposed questions to be asked to the jurors concerning the issue of racial prejudice." There was then set forth a list of questions headed by the defendant's question numbered 5, and followed by questions numbered 3, 4, 6-10 submitted by the defendant Daniels and questions numbered 10-19 submitted by the defendant Williams. Ross's brief on rehearing now refers to his own question 5, Daniels's questions 3-16 and Williams's questions 10-19. The Commonwealth properly argues that Ross cannot base assignment of error on the judge's failure to ask the questions submitted by Daniels and Williams because Ross never, by motion or otherwise, adopted those questions as his own. Nevertheless, we think that Ross's own question numbered 5 is sufficient to raise the issue of the judge's failure to ask the veniremen a question (or questions) specifically designed to uncover possible racial prejudice.

In his petition for certiorari to the Supreme Court, Ross insists that the facts in the *Ham* case "exhibit considerable similarity with the case at bar." Actually, the only similarity is that Ham and the defendant Ross are black. The petition for certiorari carefully avoids the additional facts in the *Ham* case (that Ham was well known for his civil rights activities and that he claimed that the police were "out to get him" because of his activities) which are nonexistent in the instant case. Conceivably, the Supreme Court may have considered similar circumstances to have existed in the *Ross* case in view of the allegations in the petition. Ross, in his petition, carefully excluded the judge's comments, remarks and questions addressed to the prospective jurors. For all that appears in the petition, the judge merely put the statutory questions to the jury—and no more.

[5] The defendant Ross was represented by Mr. Newman, the defendant Williams was represented by Mr. Owens and the defendant Daniels was represented by Mr. Donnelly.

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two specific areas: (1) possible race prejudice because the defendants were black and (2) possible lack of impartiality because the victim was a Boston University security guard or "quasi policeman." The judge recognized both these concerns as problems. He agreed to ask the veniremen whether they had ever done police work or whether they had any relatives in such work.[6] It is not argued that such a question failed to protect the defendants from possible bias on this matter, and this aspect of possible lack of impartiality is not before us.

Although the judge declined to ask the veniremen whether they were prejudiced against black people, he decided, "in the interest of good sense," not to mention the defendants' Muslim names appearing on the indictments, but only to refer to them as Ross, Daniels and Williams. The judge carefully weighed the likelihood of discovering bias by means of questions concerning race prejudice and came to the conclusion that it would be most unusual for such questions to reveal any such prejudice.[7] He explained to the veniremen with clarity that they must let the court

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[6] Question: "Are you presently, or have you in the past worked for a police department or a District Attorney's office, or do you have any relative or relatives who is or was engaged in such work?"

[7] The colloquy between the judge and the defence counsel on this matter was as follows:

THE JUDGE: "All right. I am going to approach it, as I have said, with all due respect to the problems, and they are important problems which you gentlemen have raised with these several questions which you have asked the Court to put in addition to the usual statutory inquiry, and without going into the details as to my reasons, I feel that no purpose would be accomplished by asking such questions in this instance.

"There are a number of reasons why I take that position, but they are sound reasons, and the reason I asked you in is that I thought from something Mr. Donnelly said, he might have wanted on the record something which was peculiar to this case, or peculiar to the circumstances which we are operating under here which perhaps he didn't want to say in open court.

"Is there anything peculiar about it, Mr. Donnelly?"

COUNSEL FOR THE DEFENDANT DANIELS: "No, just the fact that the victim is white, and the defendants are black."

THE JUDGE: "This, unfortunately, is a problem with us, and all we can hope and pray for is that the jurors and all of them take their oaths seriously and understand the spirit of their oath and understand the spirit of what the Court says to them—this Judge anyway—and I am sure all Judges of this Court—would take the time to impress upon them before, during,

know if for any reason they could not try the case impartially, without bias or prejudice or if they had already

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and after the trial, and before their verdict, that their oath means just what it says, that they are to decide the case on the evidence, with no extraneous considerations.

"I believe that that is the best that can be done with respect to the problems which—as I said, I regard as extremely important, but at the same time, my attitude—"

COUNSEL FOR THE DEFENDANT DANIELS: "There is only one thing. The only reference I would make to the facts in this case—the victim being white, and that he was a security guard in uniform and acting as a policeman."

COUNSEL FOR THE DEFENDANT ROSS: "I think that factor might suggest the question—this was my series of questions—asking the jurors whether any of their relatives are policemen."

THE JUDGE: "I will be frank with you; I have done that on the juror-by-juror voir dire in a capital case. I have never done it in anything short of a murder case.

COUNSEL FOR THE DEFENDANT ROSS: "This can be done short of juror-by-juror, just by stating that."

THE JUDGE: "I appreciate that."

COUNSEL FOR THE DEFENDANT WILLIAMS: "In behalf of James Williams, I have various questions before the Court right now, as to impartiality, and I understand the Court's position, but I would request the Court to just make general inquiry of the entire panel because whenever you have a situation involving black and white, by way of witnesses, a black witness testifying, and black, as to whether or not these jurors are impartial—"

THE JUDGE: "Let me say, again with the greatest respect for the problem, which is an acute problem, and always will be an acute problem in the courtroom and in the trial of a case involving possible racial prejudice, but one of the things that I say, and it is not the complete reasoning process that I apply to it in terms of orderly and fair administration of the Court, but one of the things I say is that I would be simply astonished if I ever asked a juror, or a group of jurors, or ever heard a lawyer ask a group of jurors if they are white, 'Are you biased against black,' if they are white, or if they are black, 'are you biased against white.' I would be simply astonished if I had an affirmative answer. The man who has the disease of bias would be the last one that would admit it."

COUNSEL FOR THE DEFENDANT WILLIAMS: "Your Honor, just recently I tried that civil rights case before Judge Julian which lasted four weeks, and some of the same questions we asked the entire panel, and I think 20 raised their hands when the Judge asked them certain questions, if they were biased or prejudiced."

THE JUDGE: "I am astonished at that. It is contrary to all of the experience that I have had."

COUNSEL FOR THE DEFENDANT DANIELS: "I tend to agree with you that people like to be good, and racism is bad, but if you ask people in the community, 'Can you be impartial?' They will say they can be. The thrust of these questions is designed to help jurors as well as the Court to bring out within themselves the fact that they might not have considered it themselves."

THE JUDGE: "I am going to adopt Mr. Newman's suggestion that we have a double problem here, not only the problem of skin color, but we also have the problem of someone who is a quasi policeman, so I am going to ask a third question, and that is,—and it is a question some of the other Superior Court Judges are allowing in the area of relations to police—'Are you presently or have you in the past worked for a police department or

formed an opinion.[8] He pointed out that "your oath requires . . . that any verdict that you return must be a fair and impartial verdict based upon the evidence and not based upon any extraneous factors, not based upon any bias or prejudice or preconceived notion or any other experience factor." The veniremen were told that they must raise their hands "[i]f, for any reason, you conclude that you cannot render a fair and impartial verdict, or if you doubt whether you can render a fair and impartial verdict."

It is clear that at least one of the prospective jurors understood that the questions put to him about his prejudice or bias included race prejudice. The defendants were asked to stand up so that the veniremen could see them. The clerk then asked the veniremen the questions outlined by the judge and various other questions previously explained to them but not in dispute here. In answer to the clerk's questions, several prospective jurors raised their hands to indicate possible bias. Those who indicated that they might be biased, prejudiced or had already formed an opinion of the defendants' guilt were then questioned individually by the judge. One prospective juror was excused because of admitted racial prejudice and two were excused for an unspecified prejudice. Seven prospective jurors were ex-

a District Attorney's office, or do you have any relative or relatives who is or was engaged in such work?'

"I know there are one or two judges that have gone much further than that, but most will go no further than that."

[8] General Laws c. 234, § 28, provides: "Examination of jurors. Upon motion of either party, the court shall or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice, therein; and the objecting party may introduce other competent evidence in support of the objection. If the court finds that the juror does not stand indifferent in the case, another shall be called in his stead."

Apart from the question concerning police affiliations, the veniremen were asked (a) "[i]f any of you are related to the defendants or to the victim, or if any of you have any interest in this case or expressed or formed an opinion or is sensible of any bias or prejudice, please make it known to the Court at this time," and (b) "[i]s there any serious reason why you cannot serve upon this jury, considering that you will be locked up, sequestered, living in a hotel away from your home for about a week?"

cused because they had already formed an opinion, seven were excused because of connections with police work, and one was excused because of his affiliation with the university where the alleged crimes occurred. The final composition of the jury of twelve was ten white persons and two black persons.[9]

Ross asserts that the similarities between his case and the *Ham* case are sufficient to bring him within the rule of that case. We cannot agree. We do not believe that the *Ham* case announced a new broad constitutional principle requiring that questions, designed to discover possible racial prejudice, be put to prospective jurors in all State criminal trials when the defendant is black (or from some other racial minority group), even when the defendant has requested such an inquiry and the statutory framework permits questioning to discover bias.

Justice Rehnquist, writing for the Supreme Court, was careful to limit the language of the court's opinion to the special circumstances of the case under consideration. The court stated: "[W]e think that the Fourteenth Amendment required the judge *in this case* to interrogate the jurors upon the subject of racial prejudice" and more specifically that "the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that *under the facts shown by this record* the petitioner be permitted to have the jurors interrogated on the issue of racial bias" (emphasis supplied). U. S. at .[e] In reaching its decision, the Supreme Court relied upon *Aldridge* v. *United States*, 283 U. S. 308, but we believe that the precedent of the *Aldridge* case, which appears to have been given constitutional dimensions, is to be limited to special circumstances as indicated by the *Ham* case.

As we noted previously, Ham was well known for his civil rights work in the locality where he was tried. The very

[9] The Commonwealth had thirty-one unused peremptory challenges left at this point. See G. L. c. 234, § 29, as amended through St. 1963, c. 187.

[e] 93 Supr. Ct. Reporter at 850.

activities that brought him to public attention specifically focused upon the issue of racial prejudice and Ham raised this matter by claiming that the police were "out to get him" because of his activities.[10] To those members of the jury who might have been prone to racial bias, the defendant Ham would have been a prominent target for their prejudice.

In the instant case, however, there was nothing that pointed to Ross as a special target for racial prejudice. The trial judge addressed the attorneys for the defendants and the Commonwealth in the lobby of the court room and stated that he "thought from something Mr. Donnelly [representing Daniels] said, he might have wanted on the record something which was peculiar to this case, or peculiar to the circumstances which we are operating under here which perhaps he didn't want to say in open court." He then asked, "Is there anything peculiar about it. Mr. Donnelly?" to which Mr. Donnelly replied, "No, just the fact that the victim is white, and the defendants are black." The attorney for Ross, who was present at the lobby conference, did not bring any other special circumstances to the judge's attention and we assume that there were none.

We hold, therefore, that the *Ham* decision does not, in this case, dictate that the trial judge was constitutionally required to question prospective jurors specifically concerning their possible racial prejudices beyond the comments and questions that were put to them. While the due process clause of the Fourteenth Amendment requires the States to insure the essential demands of fairness in criminal trials, we believe that the judge's refusal to ask specific questions designed to discover racial prejudice of the veniremen did not, in this case, violate the defendant's right to the demands of fairness. Contrary to the judge in the *Ham* case,

[10] As we have previously noted, this was Ham's principal defence and thus his credibility as opposed to that of the police was crucial. This issue was not explicitly raised in the instant case. Actually, Ross did not take the stand in his own defence and therefore his credibility was not before the jury.

the judge in the instant case expressly recognized the relevance and importance of the problem. He was meticulously careful in questioning the veniremen upon their bias and prejudice and took great pains to insure that veniremen who expressed doubts about their ability to be impartial were excluded from the jury. We believe that the judge's questions and comments to the veniremen were, in these circumstances, commensurate with the requirements of the Fourteenth Amendment.

Although we hold that the judge's examination of the prospective jurors meets the essential demands of fairness in this case, we perceive that it will be unusual for a trial judge to understand fully the dimensions of a case before he has heard it. The issue of racial prejudice may not be apparent at the outset of a case but may become evident during the trial. Therefore, when a defendant requests that the prospective jurors be questioned about their racial prejudice, the judge should make specific inquiries of counsel concerning the racial aspects of the case. Such an inquiry was properly made in the instant case.[11] If it appears from such preliminary inquiries that the case might reasonably be expected to present factors involving possible racial prejudice, then the judge should question the prospective jurors in this area. In such circumstances, it is within the trial judge's discretion to determine the precise format of the questions to be asked, provided the inquiry is "sufficient to focus the attention of prospective jurors to any racial prejudice they might entertain." U. S. at .[f]

Judgments affirmed.

Michael G. West for the defendant.

Gerald F. Muldoon, Assistant District Attorney *(James M. McDonough,* Legal Assistant to the District Attorney, with him), for the Commonwealth.

Robert H. Quinn, Attorney General, *& Jeremiah O'Sullivan,* Assistant Attorney General, amici curiae, submitted a brief.

[11] See fn. 7, *supra.*

[f] 93 Supr. Ct. Reporter at 851.

Appendix D.

ADVANCE SHEETS

OPINIONS OF THE SUPREME JUDICIAL COURT

Published under authority of Chapter 402 of Acts of 1935

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COMMONWEALTH *vs.* JAMES ROSS, JR. (and eight companion cases[1]).

Suffolk. December 6, 1971. — April 27, 1972.

Present: TAURO, C.J., CUTTER, REARDON, QUIRICO, & BRAUCHER, JJ.

Identification. Practice, Criminal, Assistance of counsel, Examination of jurors. *Constitutional Law,* Assistance of counsel, Self incrimination. *Evidence,* Inculpatory communication, Relevancy and materiality. *Search and Seizure. Probable Cause. Jury and Jurors.*

Indictments tried in the Superior Court before *Hennessey*, J.

TAURO, C.J. The defendants Ross, Daniels, and Williams appeal under G. L. c. 278, §§ 33A–33G, from convictions on nine indictments arising out of an armed robbery of Timothy Lehane, a security guard at Boston University. Each defendant was charged with armed robbery, assault with a dangerous weapon, and assault and battery with intent to murder. The principal assignments of error argued on appeal relate to the trial judge's refusal to suppress the in-court identification of the defendant Daniels by the victim Lehane and the in-court identifications of all three defendants by a witness, Howard Lembeck. In addition, the defendant Ross argues that the judge erred in admitting evidence of an inculpatory gesture by him, in admitting certain paper money in possession of the defendant Daniels, and in denying his request that the judge ask certain ques-

[1] Of the companion cases two are against James Ross, Jr., three are against Roy Daniels, Jr., and three are against James Williams.

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tions of proposed jurors to determine possible racial prejudice.

From the evidence presented at voir dire and at trial, the following appears: On March 6, 1970, at 4 A.M. a black 1960 Oldsmobile containing three black males pulled up beside the pumps at Silva's Texaco Station, 601 Commonwealth Avenue, Boston. Howard Lembeck, the attendant on duty, conversed with the men, who remained inside the automobile. He sold one of them an inflated plastic rabbit. At one point, he leaned inside the car and passed out cigarettes to each of the men and, at another point, the men asked whether the Boston University radio tower was open, and Lembeck replied, "I don't know." Apart from two brief visits to the station office, Lembeck stood next to the Oldsmobile beside the rear window on the passenger's side. Allegedly, the defendant Ross was seated in front on the driver's side, the defendant Williams in front on the passenger's side, and the defendant Daniels in back on the passenger's side. The area in which the vehicle was parked was illuminated by floodlights.

After fifteen or twenty minutes, Lehane drove into the pump area of the filling station in an unmarked Boston University security automobile. The man identified as Daniels questioned Lembeck about Lehane, and Lembeck told him that Lehane was a security guard at Boston University. This man then got out of the Oldsmobile and, carrying the plastic rabbit, approached Lehane who, in the meantime, had gotten out of his vehicle. In plain view of Lembeck, the man and Lehane conversed for approximately two minutes in which time the man offered to sell Lehane the plastic rabbit. He also asked whether "Eddie" was over at the School of Public Communications and Lehane answered that he would go over and find out. Following the conversation, Lehane left the filling station and drove up Commonwealth Avenue to the School of Public Communications. The man identified as Daniels and his two companions followed in the Oldsmobile and parked two car lengths in front of Lehane's car on Hinsdale Street. A brutal and unprovoked attack ensued in which Lehane

received serious, multiple stab wounds. The man identified as Daniels was the first to attack but the other men later joined in. At one point an assailant said, "Get his gun," and then the victim felt a hand reach into his pocket and take his wallet. The three men then left Lehane bleeding, on the ground. Back at the filling station, five or ten minutes after Lehane and the three men had left, the attendant Lembeck observed the black 1960 Oldsmobile coming down Commonwealth Avenue at a high rate of speed with three black male occupants.

Later the same morning at approximately 6 A.M., two Boston police officers in a patrol car observed a black Oldsmobile turn from Dartmouth Street onto Tremont Street, through a flashing red light, at about fifty miles an hour. The officer driving the patrol car was aware of the assault at Boston University about an hour earlier. After a pursuit on Tremont Street, the police officers stopped the Oldsmobile and took the occupants, four black men, into custody. There was a large pink bunny with visible red stains on the rear deck. At this time a cursory search was made of the men. Later at station 4, while making an inventory of the defendants' possessions, one of the arresting officers removed a wallet, folded in thirds, from the defendant Daniels's outer coat pocket. He slid the wallet across a sloping desk to the booking officer, the fold opened, and out fell a five dollar bill and two ones. Upon observing bloodstains on two of the bills, the police segregated all three bills from the wallet and kept them for further investigation.

Still later in the morning, two police officers interviewed Lembeck at the filling station. Lembeck then went with the officers to the police station, where he made a written statement, and then to the Roxbury District Court, where he observed the defendants Ross and Daniels and a third man in the "lockup" area and later at the arraignment. On voir dire, Lembeck testified that, without any direction from police, he scrutinized about a dozen men in the "lockup" area, and that privately in his own mind he picked out Ross and Daniels. At trial, he was permitted to testify that the defendant Ross gestured to him from

within the wire enclosure by raising a finger to his lips suggesting silence. Also on voir dire, he testified that he identified Ross and Daniels for the police after watching the arraignment but that he did not identify the third man arraigned with them. The defendant Williams, the fourth man in the car, was not present at the arraignment.

About a week later, Lembeck identified the defendant Williams after viewing a group of fourteen police photographs of black males the same age as the defendants. These included pictures of Ross, Daniels, and the third man at the arraignment. Lembeck knew at this time that the police held a fourth suspect who had not been present in the District Court. Lembeck first viewed the pictures at the filling station and made his identification of Williams on the second run through the photographs. He also identified Ross and Daniels. He was then taken to the police station where he again looked at the photographs and identified Williams. Approximately three months later, there was a third showing of the photographs, this time at the district attorney's office. On the same day, Lehane also visited the district attorney's office and viewed the photographs separately. He identified only the defendant Daniels.

After the voir dire hearing the judge below denied the motions of all the defendants with respect to in-court identification testimony but did allow the defendants' motions in so far as they might be "construed as motions to suppress the Commonwealth's offering of the photographic identification procedures by the witnesses Lembeck and Lehane, and the Roxbury courthouse identification procedures by the witness Lembeck." Later at trial, however, the judge limited his last ruling to the extent that he allowed Lembeck to give testimony concerning the attempt by the defendant Ross to communicate with Lembeck by gesture at the Roxbury District Court.

1. Each defendant contends that the judge erred in permitting Lembeck to identify him at trial. The defendants Ross and Daniels maintain, principally in reliance upon *United States* v. *Wade*, 388 U. S. 218, *Gilbert* v. *California*,

388 U. S. 263, and *Stovall* v. *Denno*, 388 U. S. 293, that Lembeck's in-court identifications were the fruit of impermissibly suggestive pre-trial lineups, conducted in the absence of counsel, in violation of the right of the defendants to counsel, and to a fair trial. In addition, the defendant Ross contends on the basis of *Simmons* v. *United States*, 390 U. S. 377, as does the defendant Williams, that Lembeck's in-court identifications were tainted by prior photographic identification procedures.

The judge after making detailed subsidiary findings on all the issues of identification concluded as follows: "The circumstances surrounding the identification procedures by Mr. Lembeck at the Roxbury courthouse have not been shown in enough detail before me to demonstrate an illegality in those procedures. Nor has any illegality been demonstrated re the photograph[ic] identifications made by the witness . . . Lembeck . . . . However, even assuming the illegality of these procedures, I find that . . . the in-court identifications of all three defendants by the witness Lembeck are independent of the in-custody procedures and are therefore valid."

The judge ruled that the Commonwealth had satisfied its burden of proving the independence of the in-court identifications by "clear and convincing evidence" as *United States* v. *Wade*, *supra*, at 224, requires. There was an ample evidentiary basis to support the judge's conclusion.

We deal first with the pre-trial identifications of Ross and Daniels. While there may have been an element of suggestiveness in Lembeck's confrontations with the defendants at the Roxbury court house, we believe that the judge correctly emphasized Lembeck's prior opportunity to observe the men at the filling station earlier the same morning. The pump area of the filling station was well lighted, and Lembeck could see the features of the three occupants clearly. Although he talked mainly with Daniels, he had some conversation with all three men, he was in their presence for approximately twenty minutes, and he leaned inside the automobile at one point and gave each man a cigarette. Later, he saw Daniels outside the automobile

as he conversed with Lehane. The atmosphere during Lembeck's prolonged encounter with the trio was not casual, but gave Lembeck reason to feel uneasy and thus to be more conscious and aware of the men. The defendants argue that Lembeck did not describe the men in detail in either his oral or his written statement to the police; however, it is undisputed that the police did not ask for details and, in this circumstance, we attach no particular significance to the lack of a detailed description in Lembeck's statements.

In cases where there has been a suggestive in-custody identification, the determination whether to permit an identification at trial requires a consideration of a variety of factors. *United States* v. *Wade*, *supra*, at 241.[2] See *Gilbert* v. *California*, 388 U. S. 263, 272–274; *Commonwealth* v. *Cooper*, 356 Mass. 74, 84; *Commonwealth* v. *Wilson*, Mass. , ;[a] *Commonwealth* v. *Mendes*, Mass. , .[b] The factors applied, however, depend upon their context, and every factor is not necessarily entitled to equal weight. See *United States* v. *Wade*, 388 U. S. 218, 241–242, n. 33; *Stovall* v. *Denno*, 388 U. S. 293, 302. If greater weight is given to any single factor, "[t]he extent of the witness' opportunity to observe the defendant at the time of the crime . . . seems the most important. Clearly the firmer the contemporaneous impression, the less is the witness subject to be influenced by subsequent events." *Allen* v. *Moore*, 453 F. 2d 970, 975 (1st Cir.). *Commonwealth* v. *Mendes*, *supra*.[b] In the circumstances of the instant case, we are satisfied that Lembeck had ample opportunity to observe all three men at the filling station and that, as a result of his observations, he received a firm contemporaneous impression of each of them. We have considered the evidence bearing upon Lembeck's confronta-

[2] The six factors enumerated in *United States* v. *Wade*, 388 U. S. 218, 241, were: "(1) The extent of the witness' opportunity to observe the defendant at the time of the crime; prior errors, if any, (2) in description, (3) in identifying another person or (4) in failing to identify the defendant; (5) the receipt of other suggestions, and (6) the lapse of time between the crime and the identification." *Allen* v. *Moore*, 453 F. 2d 970, 975 (1st Cir.).

[a] Mass. Adv. Sh. (1971) 1731, 1734–1735.

[b] Mass. Adv. Sh. (1972) 681, 684.

tions with Ross and Daniels at the Roxbury court house, and we conclude the judge correctly ruled that these confrontations were not so suggestive as to taint Lembeck's initial impression of the men. *Cooper* v. *Picard*, 428 F. 2d 1351, 1354 (1st Cir.), *S. C.* 316 F. Supp. 856, 859 (D. Mass.). See *Commonwealth* v. *McGrath*, Mass. , – .[c] Compare *Foster* v. *California*, 394 U. S. 440, 442–443. For these reasons, we conclude there was sufficient basis for the judge's determination that the in-court identifications of Ross and Daniels had an origin independent of Lembeck's pre-trial confrontations with the defendants at the court house. See *Commonwealth* v. *Robinson*, 355 Mass. 620, 621–622; *Commonwealth* v. *Cooper*, *supra*, at 84–85; *Commonwealth* v. *Cefalo*, 357 Mass. 255, 257–258;[d] *Commonwealth* v. *Balukonis*, 357 Mass. 721, 725;[e] *Commonwealth* v. *Wilson*, Mass. , – ;[f] *Commonwealth* v. *Tempesta*, Mass. , .[g] Compare *Commonwealth* v. *Kazonis*, 356 Mass. 649, 653.

We turn next to the claims of the defendants Ross and Williams concerning photographic identification procedures followed by the police. Both defendants point to the judge's finding that, of the photographs shown to Lembeck, "[o]nly the pictures of the three defendants . . . contained on the reverse side the names and other information concerning the subjects of the photographs." However, there was no finding, nor was there any evidence on which a finding could be based, that the witness saw the written material, much less was influenced by it. Furthermore, apart from this writing, the photographs were all of the same type and each showed a black male of approximately the same age as the defendants.

The defendant Williams also objects to the manner in which the photographs were shown. He notes that, when

[c] Mass. Adv. Sh. (1972) 591, 596–597.

[d] Mass. Adv. Sh. (1970) 507, 509.

[e] Mass. Adv. Sh. (1970) 1043, 1046–1047.

[f] Mass. Adv. Sh. (1971) 1731, 1734–1735.

[g] Mass. Adv. Sh. (1972) 335, 338–339.

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Lembeck viewed the photographs at the police station, an officer pointed to the picture of Williams and inquired about him by name, and that the witness then made a positive identification. While we might attach more significance to this episode if it had been Lembeck's first identification of Williams (see *United States* v. *Trivette*, 284 F. Supp. 720, 723 [D. D. C.]), we see little, if any, significance in the episode since the witness had already identified Williams on a prior showing, an hour earlier at the filling station, without any suggestion whatever from the police.

We agree with the judge that police procedures in connection with the photographic identifications were not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U. S. 377, 384. *Commonwealth* v. *Wilson*, 357 Mass. 49, 54.[h] In any event, even if we were to assume that they were, we are satisfied that Lembeck's prior observations of Ross and Williams on the morning of the crime were "an independent source" for his in-court identifications. *United States* v. *Wade*, 388 U. S. 218, 242. See *Commonwealth* v. *Wilson*, 357 Mass. 49, 55;[i] *Commonwealth* v. *McGrath*, Mass. , .[j]

We recognize that the objections of the defendant Williams to some extent relate to the absence of counsel at the various showings of photographs to Lembeck. As we understand the *Simmons* decision, however, it was expressly limited to due process considerations. No claim was made under the Sixth Amendment. *Simmons* v. *United States*, 390 U. S. 377, 383. The case of *Cox* v. *State*, 219 So. 2d 762 (Ct. App. Fla.), to which Williams directs our attention, involved a video taped lineup and is plainly distinguishable from the instant case on the facts. Nor do we believe that the showing of standard police identification photographs constitutes a State compelled "confrontation" or exhibition within *United States* v. *Wade*, 388 U. S. 218, 228. Cf. *Commonwealth* v. *Geraway*, 355 Mass. 433, 438–439. In this regard, we agree with the following statement from *United States* v. *Bennett*, 409 F. 2d 888, 899–900 (2d Cir.), cert. den. sub nom. *Haywood* v. *United States*, 396 U. S. 852, reh. den. 396 U. S. 949: "[T]o require that defense counsel be allowed or appointed to attend out-of-court proceedings where the defendant . . . is not present would press the Sixth Amendment beyond any previous boundary. None of the classical analyses of the assistance to be given by counsel . . . [citations omitted] suggests that counsel must be present when the prosecution is interrogating witnesses in the defendant's absence even when . . the defendant is under arrest; counsel is rather to be provided to prevent the defendant himself from falling into traps devised by a lawyer on the other side and to see to it that all available defenses are proferred. Many other aspects of the prosecution's interviews with a victim or a witness to a crime afford just as much opportunity for undue suggestion as the display of photographs; so, too, do the defense's interviews, notably with alibi witnesses. . . . [I]n [the] *Wade* [case] itself, the Court listed as one of the ways the prosecution might attempt to show that a witness' identification of defendant at trial was not the fruit of a lineup held in the absence of counsel a showing of 'the identification by picture of the defendant prior to the lineup,' 388 U. S. [218] at 241 . . ., which clearly implies that such identifications are permissible even when defendant's counsel is not present."[3] See *United States* v.

[h] Mass. Adv. Sh. (1970) 235, 239.

[i] Mass. Adv. Sh. (1970) 235, 239.

[j] Mass. Adv. Sh. (1972) 591, 597.

[3] The majority of circuits of the United States Court of Appeals follow the approach of the Second Circuit in the *Bennett* case. See *United States* v. *Collins*, 416 F. 2d 696, 699–700 (4th Cir.), cert. den. sub nom. *Collins* v. *United States*, 396 U. S. 1025; *United States* v. *Ballard*, 423 F. 2d 127, 130–131 (5th Cir.); *United States* v. *Serio*, 440 F. 2d 827, 829–830 (6th Cir.), cert. den. sub nom. *Serio* v. *United States*, 404 U. S. 838; *United States* v. *Robinson*, 406 F. 2d 64, 67 (7th Cir.), cert. den. sub nom. *Robinson* v. *United States*, 395 U. S. 926; *United States* v. *Long*, 449 F. 2d 288, 301–302 (8th Cir.); *Allen* v. *Rhay*, 431 F. 2d 1160, 1166–1167 (9th Cir.), cert. den. 404 U. S. 834; *United States* v. *Edwards*, 433 F. 2d 357, 358 (9th Cir.); *United States* v. *Roustio*, 435 F. 2d 923, 924 (9th Cir.); *United States* v. *Williams*, 436 F. 2d 1166, 1169 (9th Cir.), cert. den. sub nom. *Williams* v. *United States*, 402 U. S. 912; *United States* v. *Fowler*, 439 F. 2d 133, 134 (9th Cir.); *McGee* v. *United States*, 402 F. 2d 434, 436 (10th Cir.), cert. den. 394 U. S. 908; *Reck* v. *United States*, 410 F. 2d 1131, 1132 (10th Cir.), cert. den. 396 U. S. 970; *United States* v. *Von Roeder*, 435 F. 2d 1004, 1010 (10th Cir.). But see *United States* v. *Zeiler*, 427 F. 2d 1305, 1307 (3d Cir.); *United States* v. *Ash*, F. 2d , (D. C. Cir.) (en banc, 5–4) (10 Cr. L. Rep. 2408). Decisions in ten States

Roth, 430 F. 2d 1137, 1140 (2d Cir.) (following the *Bennett* decision), cert. den. sub nom. *Roth* v. *United States*, 400 U. S. 1021.

2. Nor is there merit in the defendant Daniels's argument that the judge erred in permitting the victim Lehane to identify him at trial. He raises objections to police photographic identification procedures under *Simmons* v. *United States*, 390 U. S. 377, which are similar in nature to those of the defendant Williams just considered. Lehane spoke with the man he identified as Daniels, face to face at a distance of two feet, for two to three minutes in a well lighted area of the filling station. The conversation (first about the inflated plastic rabbit and later about "Eddie" at the School of Public Communications) was such to arouse Lehane's suspicions and to cause him to scrutinize the man's appearance. This man was Lehane's principal assailant. About three months later at the district attorney's office, Lehane viewed the same set of photographs as the witness Lembeck had seen earlier. There was, as we have stated, nothing suggestive about these photographs apart from some writing on the reverse side of four pictures in the set.[4] At voir dire, Lehane testified that he viewed the photographs face up, and only after picking out Daniels, did he notice the writing on the back of some of the pictures. No police were present during the viewing, and although Lehane knew the set contained pictures of all his assailants, he declined to identify any but the photographs of Daniels. Had the writings influenced him, a different result might ensue. While it is true he had seen a newspaper photograph showing

accord with the *Bennett* case. *People* v. *Lawrence*, 4 Cal. 3d 273. *Reed* v. *State*, 281 Atl. 2d 142, 145–146 (Del.). *Staten* v. *State*, 248 So. 2d 697 (Ct. App. Fla.). *People* v. *Martin*, 47 Ill. 2d 331, 336, cert. den. sub nom. *Martin* v. *Illinois*, 403 U. S. 921. *Smith & Samuels* v. *State*, 6 Md. App. 59, 64. *Crenshaw* v. *State*, 13 Md. App. 361, 365–370. *Stevenson* v. *State*, 244 So. 2d 30, 33 (Miss.). *State* v. *Brookins*, 468 S. W. 2d 42, 47 (Mo.). *State* v. *Accor*, 277 N. C. 65, 80–81. *State* v. *Searcy*, 4 Wash. App. 860, 861–864. *Kain* v. *State*, 48 Wis. 2d 212, 218–219. Decisions in two States are contra. *Thompson* v. *State*, 85 Nev. 134, 137–138. *Commonwealth* v. *Whiting*, 439 Pa. 205, 209, cert. den. sub nom. *Pennsylvania* v. *Whiting*, 400 U. S. 919.

[4] The photographs of the fourth man arrested with the defendants on the morning of the crime, as well as those of the defendants, bore the name of the subject and other data on its reverse side.

Daniels and the man arraigned with both Ross and Daniels, significantly he picked out only Daniels's picture among those he viewed at the district attorney's office.

In these circumstances, the judge was correct in concluding that there was nothing in the photographic identification procedures sufficient "to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U. S. 377, 384. Further, regardless of any possible suggestiveness in the photographic viewing,[5] we conclude that the observations of Lehane on the morning of the crime fixed in his mind the features of his principal assailant and provided at trial "an independent source" for his identification of Daniels. *United States* v. *Wade*, 388 U. S. 218, 242. See *Commonwealth* v. *Wilson*, 357 Mass. 49, 55;[6] *Commonwealth* v. *McGrath*, Mass. , .[7]

3. We come next to the argument by the defendant Ross that there was error in the admission of testimony by Lembeck that he observed the defendant make an inculpatory gesture while at the Roxbury court house. Ross contends that the evidence of the inculpatory gesture was the direct result of an illegal pre-trial confrontation and was therefore inadmissible under *Gilbert* v. *California*, 388 U. S. 263, 272–273. We do not agree.

It is undisputed that police officers brought Lembeck to the court room at the Roxbury District Court between nine and ten o'clock on the morning of the crime. There were approximately twelve black males, including the defendants Ross and Daniels, in a wire enclosure visible from the court room. Lembeck testified that, without encouragement from police, he "looked around on . . . [his] own," and that when no police were present, the defendant Ross placed the forefinger of his right hand vertically to his lips while at the same time making a "peace sign" (first and second

[5] To the extent, however, that the defendant Daniels relies on the Sixth Amendment, we reject his claim without qualification. For the reasons stated, *supra*, we are of the opinion that the right to have counsel present does not extend to showings of standard police identification photographs.

[6] Mass. Adv. Sh. (1970) 235, 239.

[7] Mass. Adv. Sh. (1972) 591, 597.

fingers forming a "V") with his left hand. According to Lembeck, the police at no time pointed to, nor did they ask him to identify, any of the men in the enclosure. He picked out the defendants Ross and Daniels in his own mind, but he did not tell the police until later.

The right to have counsel present attaches at every "critical stage" of a criminal case where the State exhibits the defendant to the victim of the crime or to potential witnesses against him. *Commonwealth* v. *Cooper*, 356 Mass. 74, 80–83. *Commonwealth* v. *Guillory*, 356 Mass. 591, 592–593. *Commonwealth* v. *Wilson*, 357 Mass. 49, 55–56.[m] See *United States* v. *Wade*, 388 U. S. 218, 236–237; *Gilbert* v. *California*, *supra*, at 272. See also *Simmons* v. *United States*, 390 U. S. 377, 382–383; *Foster* v. *California*, 394 U. S. 440, 442; *Coleman* v. *Alabama*, 399 U. S. 1, 7. The defendant Ross makes much of the fact that the police brought the witness to the court room in order to view the arraignments and, if possible, to identify the suspects. However, even if we agreed that this factor sufficiently indicates a State compelled confrontation, we perceive no constitutional error in the admission of Lembeck's testimony concerning the defendant's gesture to him. While pre-indictment lineup may be a "critical stage" within the meaning of the *Wade* case (see *Commonwealth* v. *Cooper*, *supra*; *Mason* v. *United States*, 414 F. 2d 1176, 1178–1181 [D. C. Cir.]), we do not believe that lack of counsel is determinative in the present circumstances. The purpose of the *Wade* case, as the defendant Ross himself states, is to provide the accused, through the presence of counsel, with an adequate basis at trial to recount any unfairness in pre-trial police identification procedures and to enable an informed cross-examination of identification witnesses. *United States* v. *Wade*, *supra*, at 232. It is difficult, however, to see the relevance of this protection in the present situation where, prior to arraignment, the defendant Ross signalled the witness from the detention pen. The gesture was a voluntary act and in no sense the result of police exploitation. Thus,

[m] Mass. Adv. Sh. (1970) 235, 239–240.

even assuming arguendo the illegality of the witness's observation of the lockup, we are nonetheless satisfied that evidence of the inculpatory gesture came "by means sufficiently distinguishable to be purged of the primary taint" of the lockup identification. *Wong Sun* v. *United States*, 371 U. S. 471, 488. See *Gilbert* v. *California*, *supra*, at 272–273.

Furthermore, we believe the Supreme Court never intended that the *Wade* decision should protect a criminal defendant from an inculpatory communication, whether by word or by gesture, if the communication is voluntary. The prohibition against pre-trial identification without notice and without counsel depends on the Sixth Amendment and not on the Fifth Amendment. In *United States* v. *Wade*, *supra*, at 222, the court said: "We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have." See *Commonwealth* v. *Cooper*, 356 Mass. 74, 82. If the defendant's gesture created a "critical" situation for him, responsibility rests with the defendant and not with the Commonwealth. In the absence of this voluntary gesture on the defendant's part, it is clear that the judge would have suppressed Lembeck's identification of the defendant in the detention area, in its entirety, just as he suppressed the later identification at his arraignment. In the circumstances, the defendant cannot now complain that his own voluntary conduct deprived him of his constitutional rights. Nothing was done or said to the defendant which compelled his act of self-incrimination. In any event, even if the defendant's lawyer had been present in the court room, we fail to see what protection his mere presence would have afforded the defendant. "No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented." *Schmerber* v. *California*, 384 U. S. 757, 766. This is the logical rationale unless we require that counsel must be with a defendant at all times

and places (including the "dock") so that he may advise him not to incriminate himself by gesture to those who may be witnesses against him. We do not believe the Fifth Amendment protection against self-incrimination can be carried to such an extreme. See *Miranda* v. *Arizona*, 384 U. S. 436, 474.

4. The defendant Ross contends that the judge erred in admitting in evidence against all the defendants certain paper money, covered with bloodstains, which the police took from the defendant Daniels while making an inventory of his possessions at the police station. Ross argues that admission of the money was error because it was the fruit of an illegal search and seizure and, also, because it was alternatively irrelevant or prejudicial in the circumstances of this case.

We consider the defendant's nonconstitutional ground first. "The relevancy of . . . [evidence] depends upon the question, whether it has a rational tendency to prove the issues made by the pleadings or other incidental material issues developed in the course of the trial." *Commonwealth* v. *Durkin*, 257 Mass. 426, 427–428. The fact that there was no testimony as to the type of the blood on the paper money goes to the weight and not to the admissibility of the evidence. The victim Lehane testified that the defendant Daniels and two other black men had stabbed and robbed him, that he had bled profusely, and that a five dollar bill was among the property taken from him. Also, there was testimony that the paper money was found not within the compartment of the defendant Daniels's wallet but rather inserted loosely inside the fold. Further, the testimony of the witness Lembeck placed the defendants Ross and Williams as well as the defendant Daniels at the scene of the crime. We conclude, therefore, that the paper money had probative value because, together with other evidence, it tended to establish the fact of robbery and to constitute a link between all three defendants and the crime. See *Commonwealth* v. *Abbott*, 130 Mass. 472, 473; *Commonwealth* v. *Durkin*, *supra*, at 428; *Commonwealth* v. *Norton*, 339 Mass. 592, 594; *Commonwealth* v. *Palladino*, 346 Mass.

720, 726; *Commonwealth* v. *White*, 353 Mass. 409, 419. There is no merit to the contention by the defendant Ross that the blood tainted paper money was so inflammatory as to be inadmissible. See *Commonwealth* v. *Stirling*, 351 Mass. 68, 71–72.

Inasmuch as the Commonwealth does not contest Ross's standing, we proceed to the merits of his claim of constitutional error with reference to the paper money. In denying his motion to suppress made under *Mapp* v. *Ohio*, 367 U. S. 643, the judge ruled as follows: "[t]he procedure which gave rise to the seizure . . . [of the paper money] was not a search within the Constitutional prohibitions raised by this motion, but instead was a mere inventory of the suspect's effects within the unvarying police procedures, for the purpose of protecting the valuables of the suspects and removing from them any property which could be instruments for suicide or self-injury by prisoners."[6] The judge made subsidiary findings, fully supported by the evidence, which may be summarized as follows: After arresting the defendants Ross, Daniels, and Williams and a fourth man, the police took the suspects to the police station for booking. There, as a part of normal booking procedures, an inventory was made of their possessions. The paper money later sought to be suppressed became visible simultaneously to two officers when one officer slid Daniels's wallet across a sloping booking desk to the other officer and the fold in the wallet opened and three loose bills emerged from the fold. The officers seized the bills when they observed what appeared to be bloodstains on two of them. At this time, they were aware that there had been an armed robbery, although they did not know the amount of money allegedly taken from the victim. There was no error.

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[6] The judge also made a second ruling that "even if the procedure at the police station were construed to be a search within the Constitutional prohibitions raised by the motion, the events at the police station constituted a reasonable and lawful continuation of the hasty and permissible search of the suspects which was conducted at the time and place of the arrests and which was temporarily suspended for good and necessary reasons of security, and was then continued at the police station after a lapse of only about seven minutes." In view of our holding, *post*, we find it unnecessary to review this second ruling.

"It is well established that under certain circumstances the police may seize evidence in plain view without a warrant." *Coolidge* v. *New Hampshire*, 403 U. S. 443, 465. These circumstances include a requirement that discovery of the evidence be inadvertent and incident to legitimate police activity. *Id.* at 465–471. See *Commonwealth* v. *Haefeli*, Mass. , – ;[8] *Harris* v. *United States*, 390 U. S. 234, 236. There must, in addition, be "a nexus . . . between the item to be seized and criminal behavior." *Warden* v. *Hayden*, 387 U. S. 294, 307. In the instant case, as the defendant Ross concedes, there is no question that the pre-incarceration inventory of possessions was a legitimate police function. On the evidence, an ultimate finding was warranted that the paper money seized came into plain view through inadvertence and during routine, legitimate police work. See *Westover* v. *United States*, 394 F. 2d 164 (9th Cir.). Compare *Brett* v. *United States*, 412 F. 2d 401, 405–406 (5th Cir.); *United States* v. *Jones*, 317 F. Supp. 856, 858 (E. D. Tenn.).[7] Finally, the bloodstains on two of the bills, and the suspicious location of these bills outside the compartment of the wallet, provided sufficient nexus between the paper money and the armed robbery to provide probable cause for the seizure. See *Commonwealth* v. *Haefeli*, *supra*, at – .[8] For these reasons, we cannot say that it was improper in the circumstances of this case for the police to seize the paper money without first obtaining a search warrant.

5. The defendant Ross asserts that the judge's failure to ask the veniremen specific questions drawn by the defendant on the subject of racial prejudice deprived him of the right to an impartial jury. We said in *Commonwealth* v. *Nassar*,

[8] Mass. Adv. Sh. (1972) 423, 432–433.

[7] Furthermore, there was no evidence here, as there was in the *Jones* case (at 857), that police went through the compartments of the suspect's wallet. Even if this had been the case, however, it would have been open for the Commonwealth to show that it was necessary to count the money in the suspect's wallet in order to give the suspect an accurate receipt and thereby to ensure the safety of his valuables. This justification was apparently not considered in the *Jones* case. See p. 858.

[8] Mass. Adv. Sh. (1972) at 433–434.

354 Mass. 249, 253–254; "In accordance . . . with our long standing practice, inquiry of prospective jurors was only by the judge. A trial judge is required only to ask those questions prescribed by statute or court decision. Other questions are in his discretion. . . . [citations omitted] There is ample power in this court to review whether a trial judge has committed any abuse of discretion in refusing to put additional questions, or otherwise to test members of the venire for bias or interest." Upon his probing the subjects required by law (see G. L. c. 234, § 28), he was satisfied that the jurors could render a fair and impartial verdict. There was no abuse of discretion, let alone any constitutional error.

Judgments affirmed.

Mary C. Kingsley (*Reuben Goodman* with her) for Roy Daniels, Jr., & another.

Michael G. West for James Ross, Jr.

Gerald F. Muldoon, Assistant District Attorney, for the Commonwealth.

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Supreme Court, U. S.
FILED
JUL 15 1975
MICHAEL RODAK, JR., CLERK

APPENDIX.

In the Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-1216.

THEODORE RISTAINO ET AL.,
PETITIONERS,

v.

JAMES ROSS, JR.,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petition for Writ of Certiorari Filed
March 26, 1975.
Certiorari Granted May 27, 1975.

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In the Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-1216.

THEODORE RISTAINO ET AL.,
PETITIONERS,

v.

JAMES ROSS, JR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Appendix to Brief for the Petitioners.

Docket Entries.

No. 48032.

		1970	
1	Mar.	25	Indictment returned.
		27	Brought into Court—waives reading of indictment—pleads not guilty—refuses mental examination.
2		27	Petition for review of conditions of release filed, after hearing, allowed. Ordered to recognize in sum of $15,000. with sufficient surety. Mittimus issued. Paquet, J.—J. Mahoney, A.D.A.—J. Gregory, stenographer. P. Newman, Attorney for Defendant.
	Apr.	1	Warrant returned without service.
3-6 incl.		6	Defendant's motion for list of names and addresses of witnesses who were summonsed to testify before the Grand Jury—motion to inspect Grand Jury testimony—motion for list of names and addresses of witnesses who did not testify before the Grand Jury, but were summonsed before the Grand Jury—motion for list of names and addresses of witnesses whom the government intends to rely upon in support of the averments contained in the indictment, filed.
6A-7		29	Defendant's motion for speedy trial—motion to exclude testimony, filed.
	May	11	Court orders writ of habeas corpus issued to Worcester County Jail for the appearance of defendant for May 14, 1970, at 12 noon. Hudson, J.
		12	Writ of habeas corpus issued.

8		14	After hearing, defendant's motions—for list of names and addresses of witnesses who were summonsed to testify before the Grand Jury—for list of names and addresses of witnesses who did not testify before the Grand Jury—for list of names and addresses of witnesses whom the Government intends to rely upon in support of the averments contained in the indictment, each denied. After hearing, defendant's motion to inspect Grand Jury testimony denied without prejudice—defendant's motion to file a motion late, after hearing, allowed—defendant's motion to exclude testimony referred to trial justice. Hudson, J.—J. Gregory, stenographer—M. Budnitz, Attorney for Defendant.
	June	3	Writ of habeas corpus issued to Worcester County Jail for the appearance of defendant for June 9, 1970.
		9	Writ of habeas corpus issued to Worcester County Jail for the appearance of defendant for June 12, 1970.
9-11 incl.		12	Defendant files by leave of Court: motion for examination of proposed jurors—motion to sever—motion that all matters in relation to the defendant's case be made subject to General Laws, Chapter 278, Sections 33A to 33G inclusive, taken under advisement.
		15	Writ of habeas corpus issued to Worcester County Jail forthwith for appearance of defendant.

12 16 Commonwealth files motion to impanel additional jurors—motion to keep jury together, after hearing taken under advisement.

17 Commonwealth's motion to impanel additional jurors and motion to keep jury together, allowed.

18 Writ of habeas corpus issued to Worcester County Jail forthwith for appearance of defendant.

19 Defendant's motion to exclude testimony filed, April 29, 1970, after hearing, allowed as to part and denied as to part.

22 Defendant's motion to sever, filed June 12, 1970, after hearing, denied in the presence of counsel—motion for examination of proposed jurors, filed by leave of Court on June 12, 1970, after hearing,

14 denied—motion to suppress filed by leave of Court and after hearing, denied as to undershirt, jacket and plastic bunny.

15 Court (Hennessey, J.) files certificate of protracted trial ordering therein impanelled a Jury of not exceeding 15 members, in accordance with General Laws, (Ter. Ed.) Chapter 234, Section 26B, as amended.

Commonwealth moves for trial on this indictment and Nos. 48033 and 48112. Trial before Hennessey, J., with indictment Nos. 48033, 48036 to 48039 inclusive 48112 to 48114 inclusive.

25 There remaining 14 members of the Jury originally impanelled at the time of final

submission of the case, the Court (Hennessey, J.) orders Jury reduced to 13 members, the name of one Juror was withdrawn and said Juror was designated as alternate Juror, in accordance with provisions of General Laws, Chapter 234, Section 26B, as amended. Commonwealth's oral motion for a mistrial—denied.

F. McAuliffe, stenographer.

Court (Hennessey, J.) orders defendant to be kept at Common Jail pending the termination of his trial.

16 26 Certificate of public convenience that Court be open on Saturday, June 27, 1970, filed.

17 29 Defendant's motion to suppress Evidence filed by leave of Court, after hearing, denied in the presence of counsel.

18-20 30 Court (Hennessey, J.) files findings and rulings re: motions of defendants to suppress identification testimony and findings and rulings re: motions to suppress certain physical evidence.

Defendant's motion for instructions to the jury, ordered filed and made part of the record.

July 1 There remaining 13 members of the Jury originally impanelled at the time of final submission of the case, the Court (Hennessey, J.) orders Jury reduced to twelve members, the name of one Juror was withdrawn and said Juror was designated as alternate Juror, in accordance with

provisions of General Laws, Chapter 234, Section 26B, as amended.

2 Verdict guilty. Jury polled at the request of defendant.

M.C.I., Walpole, Max. 30 years—Min. 18 years—deemed to have served 119 days of said sentence.

Notified of right to appeal to Appellate Division.

Mittimus issued—Hennessey, J.—Muldoon, A.D.A.—T. McAuliffe, stenographer.

P. Newman, Attorney for defendant.

21 Court (Hennessey, J.) files "Rulings and Findings re: motions to suppress from evidence certain paper money.

Motion that all matters in relation to the defendant's trial and all proceedings be made subject to provisions of General Laws, Chapter 278, Sections 33A to 33G inclusive, allowed nunc pro tunc.

22-23 6 Motion that Commonwealth furnish defendant with a free copy of the transcript of the evidence and Defendant's claim of appeal, filed.

G. Muldoon, A.D.A., notified.

24 8 Defendant files appeal to Appellate Division. Tauro, C.J., and Hennessey, J., notified.

29 Motion that Commonwealth furnish defendant with a free copy of the transcript of the evidence, filed July 6, 1970, after hearing, allowed.

Court (Hennessey, J.) orders that four copies of transcript of evidence be prepared, two copies for Supreme Judicial Court—one copy for Commonwealth—one copy for defendant at expense of the Commonwealth.

30 F. McAuliffe, official stenographer, notified of Court's order re: transcripts.

Oct. 13 Two copies of the transcript of Evidence delivered to Clerk by F. McAuliffe, official stenographer.

1971

Jan. 8 J. Gregory, official stenographer notified of Court's order re: transcripts.

Feb. 5 Two copies of the Transcript of Evidence (Hearing on Pre-Trial Motions) delivered to Clerk by J. Gregory, official stenographer.

17 Request for designation of pleadings sent to G. Muldoon, Assistant District Attorney and Attorney Bruce Jacobs, Community Legal Assistance Office, for the defendant.

25 Feb. 24 Defendant's designation of pleadings, filed.

Mar. 2 Written notice of the completion of the summary of the record sent to B. Jacobs for the defendant.

26 2 Clerk's certificate of notice filed.

27 12 Defendant's motion for extension of time for filing assignments of error to and including March 26, 1971, filed and allowed. Lurie, J.

28 26 Defendant's assignments of error filed.

No. 48033.

1970

1	Mar.	25	Indictment returned.
		27	Brought into Court—waives reading of indictment—pleads not guilty—refuses mental examination. Petition for review of conditions of release filed, after hearing, allowed. (Paper No. 2 in case No. 48032) Ordered to recognize in sum of $10,000 with sufficient surety. Mittimus issued. Paquet, J.—J. Mahoney, A.D.A.—J. Gregory, stenographer. P. Newman, Attorney for defendant.
	Apr.	6	Defendant's motion for list of names and addresses of witnesses were summoned to testify before the Grand Jury—motion to inspect Grand Jury testimony—motion for list of names and addresses of witnesses who did not testify before the Grand Jury but were summoned before the Grand Jury—motion for list of names and addresses of witnesses whom the government intends to rely upon in support of the averments contained in the indictment, filed. (Paper Nos. 3 to 6 incl. in case No. 48032)
		29	Defendant's motion for speedy trial—motion to exclude testimony, filed. (Papers No. 6A and 7 in case No. 48032)
	May	14	After hearing, defendant's motions: for list of names and addresses of witnesses who were summoned to testify before the Grand Jury—motion for list of names and addresses of witnesses who did not testify before the Grand Jury but were summoned before the Grand Jury—motion for list of names and addresses of witnesses whom the Government intends to rely upon in support of the averments contained in the indictment, each denied. After hearing defendant's motion to inspect Grand Jury testimony denied without prejudice—defendant's motion to file a motion late, after hearing, allowed—(Paper No. 8 in case No. 48032) defendant's motion to exclude testimony referred to trial justice. Hudson, J.—J. Gregory, stenographer—M. Budnitz, Attorney for defendant.
		18	Brought into Court—defendant's oral motion for a reduction of bail allowed—recognizes personally without surety in sum of $100. Hudson, J. G. Muldoon, A.D.A.—J. Gregory, stenographer—P. Newman, Attorney for defendant.
	June	12	Defendant files by leave of Court: motion for examination of proposed Jurors—motion to sever—motion that all matters in relation to defendant's trial and all proceedings be made subject to provisions of General Laws, Chapter 278, Section 33A to 33G, inclusive taken under advisement. (Paper Nos. 9-10-11 in case No. 48032)

16 Commonwealth files: motion to empanel additional Jurors—motion to keep Jury together after hearing taken under advisement. (Paper Nos. 12 and 13 in case No. 48032)

17 Commonwealth's motion to impanel additional jurors—motion to keep jury together, allowed.

19 Defendant's motion to exclude testimony, filed April 29, 1970, after hearing, allowed, as to part and denied as to part.

22 Defendant's motion to sever, filed June 12, 1970, after hearing, denied in the presence of counsel—motion for examination of proposed Jurors, filed by leave of Court on June 12, 1970, after hearing, denied—motion to suppress, filed by leave of Court and after hearing, denied as to undershirt, jacket and plastic Bunny. (Paper No. 14 in case No. 48032)

Court (Hennessey, J.) files certificate of protracted trial ordering therein impanelled a Jury of not exceeding 15 members in accordance with General Laws (Ter. Ed) Chapter 234, Section 26B, as amended. (Paper No. 15 in case No. 48032)

Commonwealth moves for trial on this indictment, Nos. 48032 and 48112.

Trial before Hennessey, J. with indictments Nos. 48032, 48036, 48037, 48038, 48039, 48112, 48113 and 48114.

25 There remaining 14 members of the Jury originally impanelled at the time of final submission of the case, the Court (Hennessey, J.) orders Jury reduced to 13 members, the name of one Juror was withdrawn and said Juror was designated as alternate Juror, in accordance with provisions of General Laws, Chapter 234, Section 26B, as amended.

Commonwealth's oral motion for a mistrial—denied.

26 Certificate of public convenience that Court be open on Saturday, June 27. 1970, filed. (Paper No. 16 in case No. 48032)

29 Defendant's motion to suppress evidence filed by leave of Court, and after hearing denied in the presence of counsel. (Paper No. 17 in case No. 48032).

30 Court (Hennessey, J.) files findings and rulings re: motion of defendants to suppress identification testimony and findings and rulings re: motions to suppress certain physical evidence. (Paper Nos. 18 and 19 in case No. 48032).

Defendant's motion for instructions to the Jury, ordered filed and made part of the record. (Paper No. 20 in case No. 48032)

July 1 There remaining 13 members of the Jury originally impanelled at the time of final submission of the case, the Court (Hennessey, J.) orders Jury reduced to 12 members, the names of one Juror was withdrawn and said Juror was designated as alternate Juror, in accordance with with provisions of General Laws, Chapter 234, Section 26B, as amended.

2 Verdict guilty. Jury polled at request of defendant.
M.C.I., Walpole, Max. 20 years, Min. 18 years, concurrent with sentence on No. 48032—deemed to have served 119 days of said sentence. Mittimus issued.
Notified of right to appeal to Appellate Division. Hennessey, J.
G. Muldoon, A.D.A.—F. McAuliffe, stenographer—P. Newman, Attorney for defendant.
Court (Hennessey, J.) files Rulings and Findings re: motions to suppress from evidence certain paper money. (Paper No. 21 in case No. 48032)
Defendant's motion that all matters in relation to the defendant's case be made subject to General Laws, Chapter 278, Sections 33A to 33G, inclusive, filed, June 12, 1970, allowed nunc pro tunc to cover all proceedings.

6 Defendant files: motion that the Commonwealth furnish defendant with a free copy of the transcript of the evidence and claim of appeal.
(Paper Nos. 22 and 23 in case No. 48032)

8 Defendant files appeal to Appellate Division. (Paper No. 24 in case No. 48032)
Tauro, C.J. and Hennessey, J., notified.

29 Defendant's motion that the Commonwealth furnish defendant with a free copy of the transcript of evidence, filed July 6, 1970, after hearing, allowed.

Court (Hennessey, J.) orders that four copies of the transcript of evidence be prepared, two copies for the Supreme Judicial Court—one copy for the Commonwealth—and one copy for the defendant at expense of the Commonwealth.

30 F. McAuliffe, official stenographer, notified of Court's order re: transcripts.

Oct. 13 Two copies of the transcript of Evidence delivered to Clerk by F. McAuliffe, official stenographer.

1971

Jan. 8 J. Gregory, official stenographer notified of court's order re: transcripts.

Feb. 5 Two copies of Transcript of Evidence (Hearing on pre-trial motions) delivered to Clerk by J. Gregory, official stenographer.

17 Request for designation of pleadings sent to G. Muldoon, Assistant District Attorney and Attorney Bruce Jacobs, Community Legal Assistance Office, for the defendant.

24 Defendant's designation of pleadings filed. (Paper No. 25 in case No. 48032)

Mar. 2 Written notice of the completion of the summary of the record sent to B. Jacobs for the defendant.
Clerk's certificate of notice filed.
(Paper No. 26 in case No. 48032)

12 Defendant's motion for extension of time for filing assignments of error to and including March 26, 1971, filed and

allowed. Lurie, J. (Paper No. 27 in case No. 48032)

26 Defendant's assignments of error filed. (Paper No. 28, in case No. 48032)

No. 48112.

1970

1 Mar. 25 Indictment returned.

27 Brought into Court—waives reading of indictment—pleads not guilty—refuses mental examination. Petition for review of conditions of release, filed, after hearing, allowed. (Paper No. 2 in case No. 48032)

Recognizes personally without surety in sum of $100.

Paquet, J.—J. Mahoney, A.D.A.—
J. Gregory, stenographer.
P. Newman, Attorney for defendant.

Apr. 6 Defendant's motion for list of names and addresses of witnesses who were summoned to testify before the Grand Jury—motion to inspect Grand Jury testimony—motion for list of names and addresses of witnesses who did not testify before the Grand Jury but were summoned before the Grand Jury—motion for list of names and addresses of witnesses whom the government intends to rely upon of the averments contained in the indictment, filed. (Paper Nos. 3 to 6 inclusive in case No. 48032)

29 Defendant's motion for speedy trial—motion to exclude testimony, filed. (Paper Nos. 6A and 7 in case No. 48032)

June 12 Defendant files by leave of Court: motion for examination of proposed Jurors—motion to sever—motion that all matters in relation to the defendant's case be made subject to General Laws, Chapter 278, Sections 33A to 33G, inclusive, taken under advisement. (Paper Nos. 9-11 in case No. 48032)

16 Commonwealth files: motion to empanel additional Jurors, motion to keep jury together after hearing taken under advisement. (Paper Nos. 12 and 13 in case No. 48032)

17 Commonwealth's motion to empanel additional jurors, and Commonwealth's motion to keep jury together—allowed.

19 Defendant's motion to exclude testimony, filed April 29, 1970, after hearing allowed as to part and denied as to part.

22 Defendant's motion to sever, filed, June 12, 1970 after hearing, denied in the presence of counsel.

Defendant's motion for examination of proposed jurors, filed by leave of Court on June 12, 1970, after hearing, denied.

Defendant's motion to suppress filed by leave of Court and after hearing, denied as to undershirt, jacket and plastic bunny, (Paper No. 14 in case No. 48032)

Court (Hennessey, J.) files certificate of protracted trial ordering therein empan-

elled a Jury of not exceeding 15 members, in accordance with General Laws, (Ter. Ed.) Chapter 234, Section 26B, as amended. (Paper No. 15 in case No. 48032)
Commonwealth moves for trial on this indictment, No. 48032 and 48033.
Trial before Hennessey, J. with indictments Nos. 48032, 48033, 48036 to 48039, 48113 and 48114.

25 There remaining 14 members of the Jury originally impanelled at the time of final submission of the case, the Court (Hennessey, J.) orders Jury reduced to 13 members, the name of one Juror was withdrawn and said Juror was designated as alternate Juror, in accordance with provisions of General Laws, Chapter 234, Section 26B, as amended. Commonwealth's oral motion for a mistrial—denied.

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2 Verdict guilty as charged. Jury polled at request of defendant.
M.C.I., Walpole—Max. 10 years,—Min. 6 years, concurrent with sentence imposed on No. 48032—deemed to have served 119 days of said sentence.
Mittimus issued. Notified of right to appeal to Appellate Division.
Hennessey, J.—G. Muldoon, A.D.A.—F. McAuliffe, stenographer.
P. Newman, Attorney for defendant.
Court (Hennessey, J.) files "Rulings and Findings re: motions to suppress from evidence certain paper money. (Paper No. 21 in case No. 48032)
Defendant's motion that all matters in relation to the defendant's case (filed on June 12, 1970) be made subject to General Laws, Chapter 278, Sections 33A to 33G, inclusive, allowed nunc pro tunc as to all proceedings.

6 Defendant files: motion that the Commonwealth furnish defendant with a free copy of the transcript of the evidence and Claim of Appeal. (Paper Nos. 22 and 23 in case No. 48032)

8 Defendant files appeal to Appellate Division. (Paper No. 24 in case No. 48032)
Tauro, C.J. and Hennessey, J., notified.

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Court (Hennessey, J.) orders that four copies of the transcript of evidence be prepared, two copies for the Supreme Judicial Court—one copy for the Commonwealth—one copy for the defendant at the expense of the Commonwealth.

30 F. McAuliffe, official stenographer, notified of Court's order re: transcripts.

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1971

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17 Request for designation of pleadings sent to G. Muldoon, Assistant District Attorney

and Attorney Bruce Jacobs, Community Legal Assistance Office, for the defendant.

24 Defendant's designation of pleadings filed. (Paper No. 25 in case No. 48032)

Mar. 2 Written notice of the completion of the summary of the record sent to B. Jacobs for the defendant.
Clerk's certificate of notice filed.
(Paper No. 26 in case No. 48032)

12 Defendant's motion for extension of time for filing assignments of error to and including March 26, 1971, filed and allowed. Lurie, J. (Paper No. 27 in case No. 48032)

26 Defendant's assignments of error filed. (Paper No. 28 in case No. 48032)

Indictment.

No. 48032.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

At the SUPERIOR COURT, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of March in the year of our Lord one thousand nine hundred and seventy.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

JAMES ROSS, the younger of that name,

on the sixth day of March, in the year of our Lord one thousand nine hundred and seventy, being armed with a dangerous weapon, to wit: a knife, did assault Timothy Lehane, with intent to rob him, and thereby did rob and steal from the person of the said Timothy Lehane, one wallet of the value of three dollars, and money of the amount and value in all of five dollars, of the property of said Timothy Lehane.

A TRUE BILL

JOHN F. McAULIFFE
Assistant District Attorney.

RAYMOND P. MAGUIRE
Foreman of the Grand Jury.

March 25, 1970

Returned into said Superior Court by the Grand Jurors and ordered to be filed.

Attest:

EDWARD V. KEATING, *Clerk.*

Indictment.

No. 48033.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

At the SUPERIOR COURT, begun and holden at the City of Boston, within and for the County of Suffolk, for the trans-

action of Criminal Business, on the first Monday of March in the year of our Lord one thousand nine hundred and seventy.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

JAMES ROSS, the younger of that name,

on the sixth day of March, in the year of our Lord one thousand nine hundred and seventy, being armed with a certain dangerous weapon, to wit: a knife, did assault one Timothy Lehane, with intent to murder him.

A TRUE BILL.

JOHN F. McAULIFFE
Assistant District Attorney.

RAYMOND P. MAGUIRE
Foreman of the Grand Jury.

March 25, 1970

Returned into said Superior Court by the Grand Jurors and ordered to be filed.

Attest:

EDWARD V. KEATING, *Clerk.*

No. 48112.

Indictment.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

At the SUPERIOR COURT, begun and holden at the City of Boston, within and for the County of Suffolk, for the trans-

action of Criminal Business, on the first Monday of March, in the year of our Lord one thousand nine hundred and seventy.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

JAMES ROSS, the younger of that name,

on the sixth day of March, in the year of our Lord one thousand nine hundred and seventy, did commit an assault and battery upon one Timothy Lehane, by means of a certain dangerous weapon, to wit: a knife.

A TRUE BILL.

JOHN F. McAULIFFE
Assistant District Attorney.

RAYMOND P. MACUIRE
Foreman of the Grand Jury.

March 25, 1970

Returned into said Superior Court by the Grand Jury and ordered to be filed.

Attest:

EDWARD V. KEATING, CLERK.

Defendant's Motion for Examination of Proposed Jurors.

Nos. 48032, 48033, 48112.

Now comes the defendant James Ross, Jr., in the above-entitled case and moves that his counsel be permitted to examine proposed jurors in his case for the purpose of determining whether such persons have any bias or prejudice, according to the questions which follow below; and if the

counsel is not so permitted to examine the proposed jurors, that the court ask these questions as follows below:

1. Are there any of you who have any reservations about the rule of law which requires you to presume the defendant's innocence through the trial?
2. Are there any of you who have reservations about the rule of law which requires the government to prove its case beyond reasonable doubt in order to justify a finding of guilty in a criminal case?
3. Are there any of you who feel that the fact that the defendant has been indicted in any way indicates that he is guilty of the crimes charged in this case?
4. Are there any of you who are more likely to believe that a policeman is telling the truth than is a person who is not a policeman?
5. Are there any of you who believe that a white person is more likely to be telling the truth than a black person?
6. Are any of you, or your close friends or relatives, presently, or ever in the past, members or employees of any law enforcement agency including local or state police?
7. Have you or your close friends or relatives ever been victims of a crime?

By his attorney,

/s/ PAUL NEWMAN
Community Legal Assistance Office, 235 Broadway
Cambridge, Massachusetts
492-6250

June 12, 1970—Filed by leave of Court.
HENNESSEY, J.
June 22, 1970—After hearing, denied except as shown in record.
HENNESSEY, J.

Defendant's Motion for the Examination on Oath of Persons Called as Jurors by Defendant's Counsel Or, in the Alternative, for Examination of Such Persons by the Court.

Nos. 48036, 48037, 48113.

The defendant moves that his counsel, under the direction of the court, be permitted to examine on oath persons who are called as jurors in his case for the purpose of determining whether such persons are sensible of any bias or prejudice, according to the questions hereinafter set forth; and the defendant moves, if his counsel is not so permitted to examine on oath persons called as jurors, that the court put the following questions individually to each person called as a juror:

1. Are you acquainted or have you knowledge of the attorney for the prosecution or the attorney for the defendant?
2. Are you more likely to believe that a policeman is telling the truth than a person who is not a policeman?
3. Do you believe that blacks have a greater propensity for violent or militant behavior than whites?
4. Over the past years have you noticed a change in the number of crimes being committed in this city?
5. Has it been severely on the increase?
6. Has it disturbed you?
7. Do you feel this increase is due primarily to blacks in the city?
8. Have you noticed an increased number of blacks and Puerto Ricans coming into your neighborhood?
9. Have you been disturbed by the changes in your neighborhood?
10. Have you thought of moving out of it?
11. Do you feel that as the city has changed that property values have increased?

12. Do you object to the number of blacks and Puerto Ricans on the welfare rolls in the city?
13. Do you think they are entitled to welfare?
14. Do you have children?
15. Do they go to public schools?
16. If in private schools, is this a result of your feelings towards the number of blacks and Puerto Ricans in the school system?
17. Have you any relatives who are members of a police force?
18. If the answer to the preceding question is in the affirmative, describe the extent of your relationship to such persons.
19. Have you any friends who are members of a police force?
20. If the answer to the preceding question is in the affirmative, please describe the extent of your friendship to such persons.

By his attorney,

June 16, 1970 — Filed
by leave of Court
June 22, 1970 — After
hearing, denied.
HENNESSEY, J.

/s/ JAMES S. DONNELLY
25 Claremont Park
Boston, Massachusetts 02118

Questions to be Asked Jurors to Determine Impartiality.

1. Have you or any members of your family ever been employed in the office of the city attorney in any City in the Commonwealth, or employed in the office of the district attorney of any County within the Commonwealth?

2. Are you, or members of your family, acquainted with any person so employed?

3. Have you or any members of your family ever been engaged in law enforcement work for any governmental agency, whether local, state or federal?

4. Have you or any members of your family ever been engaged in private investigatory work? If so engaged, did you or they make arrests?

5. Do you have any feeling that the testimony of a police officer is entitled to more weight than the testimony of a private individual?

6. Do you feel that the testimony of a private individual is entitled to equal weight to that of a police officer?

7. Do you have any close friends who are engaged in any way with any Police Department, the Sheriff's Office, or any other law enforcement agency?

8. Do you or any members of your family belong to or are you or they affiliated with any organization which sponsors special campaigns such as putting bumper strips on cars, buildings, etc. which say "Support Your Local Police"?

9. Are you a member of any group organized principally for the suppression of crime?

10. Would the fact that the defendant is black make it more difficult for you to render a verdict in his favor than if he were white?

11. If it develops in this case that testimony of black witnesses contradicts the testimony of white witnesses, other things being equal, would you give the testimony of black witnesses and white witnesses equal credit?

12. Do you have any feelings of prejudice against organizations which support civil rights for members of the black race, such as the National Association for the Advancement of Colored People (NAACP) or the Congress for Racial Equality (CORE) or the Black Panther Party?

13. Have demonstrations and other activities by blacks in various parts of the United States over the past few years left you with a feeling of hostility towards blacks?

14. Have you ever felt in your own mind that black leaders are "going too far" in their struggle for equal rights?

15. Have you ever had an experience involving a black person which left you with a feeling of prejudice concerning members of the black race?

16. Would the fact that the defendant is a member of a minority group make it more difficult for you to consider the facts objectively and render a verdict in his favor than if he were not a member of such group?

17. Are there any members of this jury who possess any prejudices with respect to the nationality of any one of the defendants which would prevent you from deciding this case solely on the evidence produced at the trial?

18. Do you have any feelings either for or against persons of the Black race who wear the Afro style haircut and long sideburns?

19. Are there any members of this jury who possess any prejudice with respect to Black people who are involved in causes seeking liberation and justice for Black people which would prevent you from deciding this case solely on the evidence produced at the trial?

20. Are there any members of this jury who read the Boston Globe, or the Boston Herald Traveler, or the Record American?

21. Have any members of this jury read any articles in the aforementioned newspapers relating to this case in any form or manner?

23. Are there any members of this jury who after having read such articles who have formed an opinion as to the guilt or innocence of this defendant which would prevent you from

being an impartial juror and deciding this case solely on the evidence produced at the trial?

By his attorney,

/s/ HENRY F. OWENS III
OWENS, DILDAY & BROWN
One State Street
Boston, Massachusetts 02109

June 12, 1970 — Filed by leave of court.
HENNESSEY, J.
June 22, 1970 — After hearing, denied except as shown in record.
HENNESSEY, J.

Designated Portions of Transcript.

[419] (Lobby conference recorded as follows:)

THE COURT: Gentlemen, I intend to empanel 15 jurors.

Is it fair to state to the prospective jurors that the approximate length of the trial will be a week?

MR. NEWMAN: Yes.

THE COURT: Is that a fair estimate?

MR. MULDOON: Yes.

THE COURT: All right. I am going to approach it, as I have said, with all due respect to the problems, and they are important problems which you gentlemen have raised with these several questions which you have asked the Court to put in addition to the usual statutory inquiry, and without going into the details as to my reasons, I feel that no purpose would be accomplished by asking such questions in this instance.

There are a number of reasons why I take that position, but they are sound reasons, and the reason I asked you in is that I thought from something Mr. Donnelly said, he might have wanted on the record something which was peculiar to this case, or peculiar to the circumstances which we are operating under [420] here which perhaps he didn't want to say in open court.

Is there anything peculiar about it, Mr. Donnelly?

MR. DONNELLY: No, just the fact that the victim is white, and the defendants are black.

THE COURT: This, unfortunately, is a problem with us, and all we can hope and pray for is that the jurors and all of them take their oaths seriously and understand the spirit of their oath and understand the spirit of what the Court says to them — this Judge anyway — and I am sure all Judges of this Court — would take the time to impress upon them before, during, and after the trial, and before their verdict, that their

oath means just what it says, that they are to decide the case on the evidence, with no extraneous considerations.

I believe that that is the best that can be done with respect to the problems which — as I said, I regard as extremely important, but at the same time, my attitude —

MR. DONNELLY: There is only one thing. The only reference I would make to the facts in this case — the victims being white, and that he was a security guard [421] in uniform and acting as a policeman.

MR. NEWMAN: I think that factor might suggest the question — this was my series of questions — asking the jurors whether any of their relatives are policemen.

THE COURT: I will be frank with you; I have done that on the juror-by-juror voir dire in a capital case. I have never done it in anything short of a murder case.

MR. NEWMAN: This can be done short of juror-by-juror, just by stating that.

THE COURT: I appreciate that.

MR. OWENS: In behalf of James Williams, I have various questions before the Court right now, as to impartiality, and I understand the Court's position, but I would request the Court to just make general inquiry of the entire panel because whenever you have a situation involving black and white, by way of witnesses, a black witness testifying, and black, as to whether or not these jurors are impartial —

THE COURT: Let me say, again with the greatest respect for the problem, which is an acute problem, and always will be an acute problem in the courtroom and in the trial of a case involving [422] possible racial prejudice, but one of the things that I say, and it is not the complete reasoning process that I apply to it in terms of orderly and fair administration of the Court, but one of the things I say is that I would be simply astonished if I ever asked a juror, or a group of jurors, or ever heard a lawyer ask a group of jurors if they are white, "Are you biased against black," if they are white, or if they are black, "are you biased against white." I would be simply astonished if I had an affirmative answer. The man who has the disease of bias would be the last one that would admit it.

MR. OWENS: Your Honor, just recently I tried that civil rights case before Judge Julian which lasted four weeks, and some of the same questions we asked the entire panel, and I think 20 raised their hands when the Judge asked them certain questions, if they were biased or prejudiced.

THE COURT: I am astonished at that. It is contrary to all of the experience that I have had.

MR. DONNELLY: I tend to agree with you that people like to be good, and racism is bad, but if you ask people in the community, "Can you be impartial?" They will say they can be. The thrust of these [423] questions is designed to help the jurors as well as the Court to bring out within themselves the fact that they might not have considered it themselves.

THE COURT: I am going to adopt Mr. Newman's suggestion that we have a double problem here, not only the problem of skin color, but we also have the problem of someone who is a quasi policeman, so I am going to ask a third question, and that is, — and it is a question some of the other Superior Court Judges are allowing in the area of relations to police — "Are you presently, or have you in the past worked for a police department or a District Attorney's office, or do you have any relative or relatives who is or was engaged in such work?" I know there are one or two judges that have gone much further than that, but most will go no further than that.

MR. MULDOON: Your Honor, would you consider also adding "employed by an attorney," particularly an attorney who might practice criminal law, where you are including district attorney's offices?

THE COURT: I think when we get into that area, or making the question so nebulous that it might fit a broader group, if

we begin talking about attorneys in [424] general, it would get too complicated. No, I think I will ask the statutory question, and I will ask this one, and ask the one concerning their ability, or inability to be locked up for a week.

Let me say this, however, gentlemen, that with respect to this last one, I am not going to make it a matter of excuse by the Court. That is putting too much of an onus on the Government. I am asking this — this is No. 2, John, "Is there any reason why you cannot serve?" The question on bias and prejudice, I will hear the juror who admits to a doubt in that area, and it may result in my excusing him. It may result in my simply saying, "You gentlemen have the information. You have heard me interview the juror." It may simply result in my stating, "You gentlemen have as much information as I. You will have to exercise the peremptory challenge".

The question on inability to be locked up for a week — that will result in the Court excusing or not — I won't put the onus there on counsel under any circumstances.

But this No. 3 question, "Are you presently, or have you in the past worked for a police department or district attorney's office, or do you have any [425] relative who is or was engaged in such work?" That is asked only for information and if any juror stands or raises his hand in regard to that, counsel have the information. They may use it as they wish, but I am not going to excuse anybody for that reason. It will be simply additional information which I hope, gentlemen, in the near future will be the type of information that will be available to counsel for both sides, if we ever get to the point where we have reasonable type of jury commissioners. If and when that comes about, we will certainly have that type of information included in the questionnaire.

Mr. Muldoon: The point I raised on the third question, would you consider making reference to a defendant committee such as Mr. Newman is a member of, and the Massachu-

setts Defenders Committee is a fairly large organization, and I don't know whether the other gentlemen are private counsel.

The Court: The only trouble with that is that police and district attorney's offices are things of very common knowledge and require no further definition. Defender committees are pretty widely unknown to the public. I don't know that they would know what we are talking about.

[426] Mr. Muldoon: In lieu of that, your Honor, I recall — I believe it was Gahan — where Judge Forte asked many questions, a general question, "Do you know of any reason . . . " Maybe you think this would give them too much of an out, "But do you know of any reason why —"

The Court: Don't misunderstand me, I am going to give them a short preliminary instruction in which I point out to them that if they feel they can't reach a fair and impartial verdict, fair to the public, and fair to the defendants, fair to the Government, and fair to the defendants, based upon the evidence, based upon pretrial publicity, or any other reason which appeals to their conscience or intellect, and I am going to speak of that with particular reference to the statutory question which will be No. 1.

Don't misunderstand me, they are going to get a brief but pointed discussion of the fact that these are not the only considerations. If there is any problem of conscience or intellect that they have, they are to bring it to the attention of the Court when the question is asked.

[427] Mr. Newman: May the record note that we except to the denial of our motions insofar as they were filed? The Court: Yes.

Exception Nos. 17-18-19

The Clerk: Your Honor, Mr. Owens has specifications and particulars, and the Commonwealth has answered the same.

Mr. Owens: No, I have not filed any motion for a bill of particulars.

THE CLERK: You waive it? MR. OWENS: I never filed one. I am not privy to what the Massachusetts Defenders filed before me. Therefore, I will not want a bill of particulars read to the jury.

THE CLERK: Thank you.

MR. OWENS: The only other thing, your Honor, would be if the Court would instruct the District Attorney that there has been certain reference made as to certain things still under advisement. Therefore, in his opening he would refrain from commenting on the Roxbury Court situation, any photographs and possibly this wallet situation.

THE COURT: Oh, I am sure Mr. Muldoon under- [428] stands that. We have excluded the proffer by the Government of these pretrial out-of-court identification procedures, both in photographs and in the District Court. I have under advisement, and I will rule upon it when it is about to be offered, out of hearing of the jury and without the knowledge of the jury, without prior knowledge of the jury, I will rule upon these alleged gestures that Ross is supposed to have made.

I will rule on that carefully, and rule carefully on the question of the money, and I am sure Mr. Muldoon understands that his opening would not include the gestures or the money, and they would not be brought to the jury's attention, prior to their coming in, if they come in at all. So there is no problem there.

(Lobby conference concluded.)

(Proceeding in open court as follows:)

MR. MULDOON: With regard to the presence of Sgt. Maillet, do I understand he can now sit with me? THE COURT: Yes, the record is clear on that. That was by agreement of counsel. [429] It is my understanding, Mr. Muldoon, that you move for trial on all nine of these indictments? MR. MULDOON: Yes, your Honor, I would be happy to move for

trial with regard to indictment 48,032, 033, 112, and all in which James Ross, Jr. is named as defendant. Move for trial on indictment 48036, 037, 113, in which Roy Daniels, Jr., is named as defendant. Indictments 48038, 039, 114 in which James Williams is named as defendant. Williams and Ross also have an alias named in their indictments.

THE COURT: Ladies and gentlemen, I am Judge Hennessey, and the indictments which are presently before me, and as to which the Commonwealth has moved for trial involve the defendant James Williams, a second defendant, Roy Daniels, and a third defendant, James Ross, Jr.

Each of these defendants is charged with three separate offenses, (1) armed robbery, (2) armed assault with intent to murder, and (3) assault and battery by means of a dangerous weapon, so there are nine indictments and each of the defendants is charged individually with those three crimes that I have read out to you.

[430] Mr. Muldoon is the assistant district attorney representing the Commonwealth, and representing the three defendants respectively are Mr. Owens, Mr. Newman, and Mr. Donnelly.

I would caution and direct you that from this time on, whether you are selected to serve on this jury or not, until further order of the Court, you are not to discuss this case among yourselves, or with anyone else in the jury pool upstairs if you return to the pool. And the Court is very serious in that regard. That becomes a part of your oath, ladies and gentlemen, and you are now directed by the Court not to discuss this matter with yourselves or with anyone else, whether or not you sit on this jury, and whether or not you return to the jury pool upstairs.

These indictments involve a Boston University security guard named Timothy Lehane as the alleged victim — that is Timothy Lehane, l-e-h-a-n-e.

The place of the crime is one of the Boston University school buildings near Commonwealth Avenue, and near Kenmore Square, at which place the Commonwealth alleges that Mr. Lehane was — the Commonwealth claims he was assaulted and stabbed a number of times [431] in that general geographical area near Commonwealth Avenue and Kenmore Square, near the B.U. school buildings.

The defendant's names are James Ross, James Williams, and Roy Daniels.

Under your oath, which you took as you began your month of service and which you take before you commence your service on this case, if you are selected, you are required to render a fair and impartial verdict upon the evidence which is presented before you, and free of any bias or prejudice or other extraneous influence.

Now, as always occurs before you are finally seated on this case, if you are, the Clerk, Mr. Voke, will ask you a question which is designed to give you an opportunity to inform the Judge prior to your being accepted as a juror, if you believe that you cannot render a fair and impartial verdict on the evidence, or if you have doubt as to whether you can render a fair and impartial verdict upon the evidence.

This question which is asked is in the usual form. Mr. Voke will put a question to you which will be, if any of you are related to the [432] the defendants or to the victim, or if you have any interest in this case or have expressed or formed an opinion, or are sensible of any bias or prejudice. If so, please make it known to the Court.

So you will have opportunity when that question is addressed to you by simply standing or raising your hand to make it known to the Court whether you have a conflict in your mind raised by that question in terms of your conviction that you cannot render a fair and impartial verdict on the evidence, or in terms of whether you have — whether or not

you have a serious doubt as to whether you can render a fair and impartial verdict on the evidence, and nothing else.

If you are exposed, or become aware of some publicity concerning this case at sometime prior to today, at anytime prior to today, that is one consideration which you should carefully think about when you decide whether or not you are going to bring a problem of conscience or intellect to the Court's attention when the Clerk asks that question which I just referred to.

The mere fact that you were exposed to some publicity, if you were, concerning this case in [433] the past does not automatically disqualify you from sitting. If however, in considering that publicity to which you were exposed, you are convinced that you could not render a fair and impartial verdict upon the evidence presented in this courtroom, and no other circumstances, or if you have a doubt whether you could render a fair and impartial verdict — under those circumstances, by reason of prior publicity, then you are required to bring it to the attention of the Court when the Clerk puts that question to which I have just referred.

Publicity alone does not disqualify you. Exposure to publicity alone does not disqualify you. Its effect upon your impartiality of judgment, as you determine it, if it will have such effect, or if you have a doubt that it will, is something that may disqualify you and you must bring it to the attention of the Court, if that is your state of mind.

Now, in addition to examining the publicity and possible knowledge you may have had by reason of prior exposure to publicity, you should examine all aspects of the case insofar as you know about it at the time that you are seated in the box to determine, based upon your intellect and your conscience, [434] whether you will be able to render a fair and impartial verdict upon the evidence in the case, and no other considerations.

If, for any reason, you conclude that you cannot render a fair and impartial verdict, or if you doubt whether you can render a fair and impartial verdict for any reason, you must bring it to the attention of the Court when the Clerk puts the question to which I just referred.

Now, the Clerk will also put a second question to you which I will tell you about in a moment. The reason for that second question is this: this jury will be locked up; it will be sequestered, living in a hotel in comfortable quarters, and as usual in such circumstances the officers will see that the necessary running around to get such personal items as you need of clothing and toilet articles and so forth are immediately obtained from your home. But the jury will be sequestered for about one week.

There will be a second question asked of you which will allow you, if in your sincere conclusion you determine that there is a serious reason why you should not serve in a locked up capacity for about one [435] week, living in a hotel, away from home. If there is such a serious reason, you will have opportunity by standing or raising your hand to bring that to the attention of the Court for the Court's ruling.

A third question will be asked of you by the Clerk to which you should give an answer, and that is this: Are you presently, or have you in the past worked for a police department or a district attorney's office, or do you have any immediate relative who also is or was engaged in such work. Is there a member of your immediate family, brother, sister, husband, wife, son, who is working in that capacity, or has worked in that capacity in a police department or district attorney's office, or have you worked in that capacity, or do you work in that capacity at the present time?

You would simply raise your hand and give the Court that information, if it is applicable to you, when that question is put to you.

All right, Mr. Voke, if you will set the defendants at the bar, we will proceed.

Gentlemen, would you step up, please?

(Bench conference recorded as follows:)

THE COURT: These indictments I meant to mention before, contain Muslim names. It is not my [436] intention in the interest of good sense to have the Clerk read other than the names which I have mentioned.

MR. OWENS: Fine, I will instruct my client.

THE COURT: And ultimately we will face the question as to whether the indictments in their present forms should go before the jury at all. I don't think it is a serious problem, but for the present, he will refer to these gentlemen only by the names of Williams, Ross, and Daniel.

MR. NEWMAN: Fine with me.

THE COURT: Any question on that? MR. DONNELLY: No.

THE COURT: We will just get by this setting up of the jury, and we will face the other aspect, as to the validity and sufficiency, or leave them out of the indictment. We will face the technicalities in the future.

MR. MULDOON: With regard to that, your Honor, with regard to the questions, it occurred to me that — particularly with the unrest on campus, whether or not the question with regard to the feeling that, pro or con, Boston University would enter their consideration.

THE COURT: No, I am inclined to think we [437] are borrowing trouble with such a question.

(Bench conference concluded.)

THE CLERK: James Williams, Roy Daniels, James Ross, Jr., stand up, please.

Each of you are now set at the bar to be tried.

(Defendants set at the bar for trial.)

THE CLERK: I direct these questions to all jurors:

(Questions directed to prospective jurors.)

(Bench conference in re Juror No. 15 as follows:)

THE COURT: All right, in answer to the question Mr. Voke put, you raised your hand. What is the problem? JUROR: I don't think I could try this, you know, without prejudice or anything like that. From reading about the case, I don't think I could do it, you know? I have already come to a conclusion.

THE COURT: Gentlemen, I will excuse the juror unless I hear objection. No objection? All right, you are excused from service by agreement of counsel, and you may take your seat at the rear.

(Bench conference in re Juror No. 10 as follows:)

[438] THE COURT: All right, is there a personal situation? JUROR: Yes, I have an elderly mother and father at home.

THE COURT: You are the only one that takes care of them? JUROR: Yes.

THE COURT: All right, gentlemen; no objection appearing, I will excuse the juror.

(Bench conference concluded.)

THE CLERK: Question 3, "Any juror who is presently or has been in the past, worked for a police department or district attorney's office, or has any relatives working in this capacity.

THE COURT: Jurors 1, 2, 6, and 7. All right, gentlemen, you may be seated.

MR. OWENS: May we approach the bench? THE COURT: Surely.

(Bench conference recorded as follows:)

MR. NEWMAN: Would you ask them to come over and ask them specifically what the relation is?

THE COURT: Gentlemen, I think what that does is make the situation even more pointed than it is at the present time. They got a clear and lucid [439] explanation. We must assume that they have risen intelligently, and they have given you substantial information about themselves. Among the three of you, you have a good quantity of challenges.

No, if it is a matter of the number of challenges, if you are talking to each other, you will have no problem in exercising your challenges. I think under the circumstances you have gotten information for your guidance which is far beyond the statutory requirements.

To put it very bluntly, it is as far as I am going.

(Bench conference re Juror No. 6.)

THE COURT: Yes.

JUROR: I have a chronic ulcer condition and it would seriously affect me in a locked up jury.

THE COURT: Gentlemen?

THE COURT: All right, sir you are excused by reason of health, by agreement of the parties.

Juror No. 14.

(Bench conference re Juror No. 14.)

THE COURT: What is the problem? JUROR: The problem is that my wife is pregnant [440] and last week she had some trouble. I don't know what the circumstances may be.

THE COURT: All right. Was it trouble requiring medical treatment? JUROR: Yes, your Honor. It required her to stay in bed.

THE COURT: Under the circumstances, gentlemen —

MR. OWENS: No objection.

MR. DONNELLY: No objection.

THE COURT: Excluded by agreement of the parties.

Gentlemen, Mr. Voke will inquire left to right. Take your time. I am not hurrying you, but I simply state that it would make for good order in the challenges.

(Bench conference in re Juror:)

THE COURT: Yes? JUROR: Yes, I have been going to the doctor on Saturdays, and I have a skin rash on my leg that I have been in contact with the doctor on every night.

THE COURT: Gentlemen, is there any objection to excusing this Juror? All right, Juror No. 2.

JUROR: Your Honor, I used to be a doorman [441] down at the Sugar Shack an all colored place; and I have serious doubts.

THE COURT: You feel under the circumstances that you would have a problem of conscience if you sat? JUROR: That's right.

THE COURT: Is there any objection to the Court excusing him? You are excused by agreement.

All right, next juror?

JUROR: I have two small children.

THE COURT: Is that the extent of it?

THE COURT: Well, under the circumstances, the Court has sympathy for your missing a week of their delightful company at this season of the year, but I am going to have to ask you to serve. I am sure there are other people with the same problem, but we would hope they won't miss you too much. You may take your seats.

Next juror?

JUROR: The name Timothy Lehane — is that the name? THE COURT: Yes.

JUROR: I went to school with him, played football [442] with him.

THE COURT: How old are you? JUROR: Forty.

THE COURT: No, it could not possibly be. Whatever man you are thinking about would be about your age, or within a year or two.

JUROR: I had no facts to go on.

THE COURT: The age is such that it couldn't possibly be the same man.

(Bench conference concluded.)

THE COURT: All right, gentlemen.

(Bench conference recorded as follows:)

THE COURT: I may not have heard correctly, but did I hear you say 6? THE CLERK: He did say 6.

THE COURT: You have expressed contentment with 6 through 15.

MR. OWENS: Oh, that is right.

THE COURT: Your challenges now at this stage, at this stage, are challenges confined only to those jurors seated in 1, 2, 3, 4, 5. If 6 through 15 change subsequently, you will have opportunity to exert further challenges, but at this stage you are confined to 1, 2, 3, 4, 5. Mr. Muldoon has the same [443] problem.

(Bench conference in re Juror:)

JUROR: Your Honor, I am a diabetic and on medication. I think in the restaurant and all this time would be harmful to my health.

THE COURT: You feel that from your knowledge of your condition, you feel it would be unwise for you to be locked up for a week? JUROR: Particularly eating out in restaurants all the time, yes.

THE COURT: You are the best judge of that. I think we should excuse him.

MR. OWENS: No objection.

THE COURT: By agreement of counsel, Mr. O'Day is excused.

Juror No. 4. Yes, Miss Walsh? JUROR: My brother is a security guard.

THE COURT: Gentlemen, her brother is a security guard. That is for your information. You may take your seat back in the panel, Miss Walsh, thank you.

MR. NEWMAN: Your Honor, if there is a time, this would be it, but would that be strong enough — challenging for cause — a security guard being the [444] victim here? THE COURT: Well, of course, she is not a security guard.

MR. OWENS: No, your Honor.

THE COURT: So she may not even like security guards.

MR. OWENS: As long as her brother is one, she would like them.

THE COURT: What do you say, Mr. Muldoon?

MR. MULDOON: There may have been a major will-fight in the family, I don't what to say.

THE COURT: We are indulging in massive challenges anyway. Incidentally, for the record, I am sure you are all aware, that each of the defendants has 15 challenges since we are going to have a jury of 15. I was hoping you were perhaps not aware of it, but I tell you in order to protect your rights.

Well, the relationship is close enough so that I will excuse the juror for cause.

MR. NEWMAN: Thank you.

THE COURT: Gentlemen, before Mr. Voke asks the question, in order that counsel would have no misunderstanding, that concludes drawings from the first number of veniremen that were brought down from [445] jury pool. Mr. Voke will put the questions in order to establish the status of these three, and then we will suspend for one hour until such time as we can fill the box, at which time the challenging process and excusing process will continue.

So put the questions to these three.

(Questions put to prospective jurors.)

(Bench conference re jurors:)

THE COURT: All right, Mr. Gardner, what is the problem? JUROR: My wife just returned from the hospital Saturday, and I think I would prefer not being locked up.

THE COURT: She had surgery? JUROR: Yes, your Honor.

THE COURT: That seems like a substantial reason. Is there any objection to the Court excusing Mr. Gardner? MR. MULDOON: No objection.

MR. OWENS: May I have a moment to speak to counsel?

THE COURT: Gentlemen, I will inquire further.

MR. OWENS: Could you?

THE COURT: Mr. Gardner, with respect to that, [446] these are routine questions which are asked in all cases of illness. Is there anybody else who could care for her in your absence? JUROR: Well, that is not the point. In other words, if she started to bleed, we would have to return her to the hospital, and I would like to be there.

THE COURT: Do you feel that there is any reasonable possibility that it would be detrimental to her health, if you were not present during the next week at home? JUROR: I think so.

MR. OWENS: I have no objection.

MR. MULDOON: No objection.

THE COURT: Under the circumstances, we will excuse Mr. Gardner.

(Bench conference concluded.)

THE COURT: Ladies and gentlemen, let me give you this final word of direction. I will remind you that when we started this procedure, I mentioned that any who were seated in the box, and any who by reason of excuses or challenges were obviously not to sit, were all bound by the same direction, and that is that until further order of the Court, you are not to discuss this case, or the empanelling procedure with anyone, [447] among yourselves, or anyone else. In short, those of you seated in the back of the room, and those of you on the panel to this point are bound by the same direction. Do not discuss what is going on in this courtroom until further order of the Court, and until you return to the jury pool — those of you in the back, when you return to the jury pool this afternoon, please keep that instruction in mind, and to those seated in the box who are potential jurors on the case, it also applies to you.

We will continue to empanel at 2:00 o'clock. Pardon me, 2:25, one hour.

(Court recessed.)

[448] AFTERNOON SESSION

THE COURT: I will see counsel on the other side.

(Bench conference recorded as follows:)

THE COURT: Gentlemen, Juror No. 204, Mr. Babine, has informed Mr. Sweeney that he is developing a urinary problem, and without further delay, I am going to excuse him back to the jury pool. Is there any objection?

MR. OWENS: No objection.

MR. DONNELLY: No, your Honor.

THE COURT: All right, Mr. Sweeney.

(Bench conference concluded — proceeding in open court as follows — with additional jurors:)

THE COURT: Ladies and gentlemen seated in the back, and at the side of the room, let me inform you that I am Judge Hennessey.

Appearing for the Commonwealth in these cases as to which we are empanelling a jury, is Mr. Muldoon. Appearing for the defendants respectively are Mr. Owens, Mr. Newman, and Mr. Donnelly.

These are indictments against each of the defendants in three separate indictments — each defendant is charged with armed robbery, assault with [449] intent to murder, while armed, and assault and battery by means of a dangerous weapon. There are nine indictments, three against each defendant.

The defendants are named James Ross, James Williams, and Roy Daniel.

I would instruct you and direct you from this time on, whether you are selected to sit on this jury or not, you are directed not to discuss this case, or mention this case to anybody else, any fellow juror up in the jury pool, or anybody else. In other words, It will remain a matter of confidence

with you until further order of the Court, whether you are selected to sit on this jury or not.

This case involves allegations by the Commonwealth that a Boston University security guard named Timothy Lehane was allegedly assaulted and stabbed a number of times near a Boston University building located in the Commonwealth Avenue-Kenmore Square area.

Now, when you are selected to take your seat in the box as a prospective juror, Mr. Voke, the Clerk, is going to put three questions to you. Let me read you those three questions so you will have time to think about them in advance, then I [450] will have something to say about each one of those questions.

The first question will be one which you have all heard before on other cases: If any of you are related to the defendant or to the victim, or if any of you have any interest in this case or expressed or formed an opinion or is sensible of any bias or prejudice, please make it known to the Court at this time.

The second question to be put to you is: Is there any serious reason why you cannot serve upon this jury, considering that you will be locked up, sequestered, living in a hotel away from your home for about a week.

The third question is, are you presently, or have you in the past worked for a police department or a district attorney's office, or do you have any relative who is or was engaged in such work?

Let me discuss the significance of each of those questions and what I want to have you thinking about when each of those is asked of you, as you take your place in the box.

With reference to the first question, which asks if you have any interest in the case, expressed or [451] formed an opinion, or sensible of any bias or prejudice, and so forth; you have already been informed very carefully by other judges in this courthouse that your oath requires as jurors that any verdict that you return must be a fair and impartial verdict based

upon the evidence and not based upon any extraneous factors, not based upon any bias or prejudice or preconceived notion of any other experience factor.

So when the Clerk asks you that question that I have just enumerated for you, Question 1, this is designed to give you an opportunity and a duty to inform the Court by standing or raising your hand, if you believe that you cannot render a fair and impartial verdict on the evidence in the case, or if you have doubt as to whether you can render a fair and impartial verdict in the case. It is your duty to inform the Court if you believe you cannot render a fair and impartial verdict, or if you doubt that you can. In either case, you must rise, or raise your hand and inform the Court in answer to the Clerk's first question put to you.

With respect to that, I would mention the fact that you may have become aware of some publicity [452] on the radio or T.V. or newspaper concerning the incident which is the subject matter of the Government's indictments in these causes.

Now, with reference to your duty to render a fair and impartial verdict on the evidence, if you have been exposed to such publicity, you should consider that carefully.

The mere fact that you have some knowledge, some prior knowledge of some allegations, or some incident by reason of publicity, does not disqualify you in view of that fact alone.

If, however, something that has come to your attention by way of publicity or otherwise prior to today, or prior to this moment about the facts of this case which would make it in your mind impossible for you to render an impartial verdict on the evidence in the case, or which creates in your mind a doubt as to whether you could be fair and impartial on the evidence, in those instances you should bring it to the attention of the Court, if such publicity has so affected your state of mind.

In addition to publicity, in connection with this first question which the Clerk will pose to you, examine all the factors, all the acts, all the [453] circumstances known to you so far concerning these indictments, and if you have for any reason, any reason, a doubt that you can render a fair and impartial verdict on the evidence in the case, in such circumstances, it is your duty to inform the Court by rising or raising your hand in order that the Court can further consider whether you should sit as a juror.

In short, ladies and gentlemen, your duty is to be able, when you take your oath, if you are a juror in this case, to be able to take the oath that you will render a fair and impartial verdict upon the evidence in the case and based upon no extraneous values.

The second question will ask you if there is any serious reason — I emphasize serious — why you should not serve on this jury, keeping in mind you will be locked up in a hotel for about a week. Keep in mind that the court officers will make prompt and efficient assistance for you in securing toilet articles, taking care of other personal problems in order that you can, insofar as they are concerned, serve in comfort.

[454] Also keep in mind that it will be your duty if selected to bring to the attention of the Court, when the Clerk asks that question, any problem you may have, and you may do so by rising or raising your hand.

The third question will be one which asks you to indicate whether you presently are, or have in the past, worked for a police department or a district attorney's office, or whether you have any relative who is or was engaged in such work.

Consider your own past and present occupations, and consider those of your immediate family, brother, sister, husband, wife, son, daughter, and answer that question in accordance with the facts.

All right, Mr. Voke, you may proceed.

(Bench conference re jurors as follows:)

THE COURT: All right, Mr. Lane, what is the problem? JUROR: My mother just passed away a few weeks ago, and my wife is almost alone at home, and I am afraid she hasn't felt the full impact as yet.

THE COURT: Emotional problems? JUROR: Yes, your Honor.

THE COURT: Mr. Lane raises the question that [455] his wife just lost her mother in death, and there is a serious emotional problem. I will hear counsel.

MR. OWENS: I have no objection, your Honor.

THE COURT: All right, excused for that reason.

MR. OWENS: In order to facilitate matters, I think I have exhausted my challenges.

THE COURT: You have?

MR. OWENS: Yes, and I now would respectfully ask the Court to excuse Juror 3 because on the sheet it says he is a guard.

THE COURT: Motion denied. Let the record show that we assume that even guards have intellects and conscience.

MR. OWENS: My exception.

EXCEPTION No. 20

THE COURT: And also have due regard for the interest of the defendants under their oaths. Mr. Lynn has been excused, and that is by agreement.

All right, we will move on and seat Juror 4 then.

(Bench conference concluded.)

THE COURT: All right, Mr. Voke.

Gentlemen?

(Bench conference re juror as follows:)

[456] THE COURT: What is the problem? JUROR: I have a mother 80 years old, and I would be unable to serve.

THE COURT: You gentlemen have heard the problem with reference to being locked up for 7 days. Any objection?

THE COURT: All right, you are excused.

(Bench conference concluded — empanelling continued.)

(Bench conference as follows:)

THE CLERK: You used up five peremptory challenges. Defendant Williams has exhausted all of his challenges.

MR. OWENS: Peremptory.

THE COURT: Yes. And you say, Mr. Muldoon, that all of these defendants should exhaust before you are required to —

MR. MULDOON: Yes, your Honor. They should go down the line, and I would resume again.

THE COURT: That is the way the rule reads.

MR. MULDOON: Yes.

MR. OWENS: Your Honor, I was of the impression that we do have three defendants; that after [457] I had exhausted mine, I can go back to the Commonwealth.

THE COURT: Get that rule out of my desk, will you, John?

Now in this instance, Mr. Muldoon, which is not specifically covered by the rule — of course the rules about which we are concerned says, "Unless otherwise ordered in a particular case . . . " Concerning the number of challenges available to the Commonwealth, I rule that you are to exert your challenges now as to seats 1 through 6 to the extent that you wish to, and then you will have opportunity again to exert your challenges after Mr. Newman is either content or satisfied — then you will have a third opportunity after the third defendant.

Whether Mr. Newman will have some left over, or whether Mr. Newman will have some left over when he is content is another question we will face later.

MR. MULDOON: Your Honor please note my exception to that ruling, because in my previous experience, just as in the examination of witnesses, the Government goes forward and then the defense go forward, and when defense are through, the Government proceeds again.

[458] EXCEPTION No. 21

THE COURT: This is a peculiar situation and the rule, I think, provides for just such a situation by leaving it discretionary with the Court as to how it shall be exerted, but let me just for your own satisfaction take you back briefly to an ordinary case.

Just remember that all the clerks say after the first defendant has finished exerting one of his challenges — remember how many times the clerk has come back to you and said, "Is the Commonwealth content" a second time, and gone back to the second defendant?

MR. MULDOON: No, that doesn't refresh me.

THE COURT: Let's hear from Mr. Voke. After the first defendant has exerted his challenge, is it not customary to go back to the Commonwealth and say, "Is the Commonwealth now content," a second time?

THE CLERK: As long as they have peremptory challenges left, the Judge usually gives them a chance to exercise it.

THE COURT: All right.

MR. MULDOON: It was my understanding that Mr. Owens' challenges were directed to jurors 1 through [459] 5.

THE COURT: Since you expressed contentment, there have been copious challenges in 1 through 5, and one change in 13, so they are available to you at this time. The others may open up to you subsequently. You have 1 through 5, and 13 to which you may direct your challenges at this time, or express contentment.

MR. MULDOON: May I have a moment?

(Jury empanelling continued.)

(Bench conference re Juror as follows:)

THE COURT: Yes, Mr. Brown, do you have a problem?

JUROR: On the date this case occurred, I saw it on television, and the daily newspapers the following morning.

THE COURT: That is all right, everybody now knows that an incident occurred, and in bringing it to the attention of

the Court, let me ask you this question. From what you know of the case now, and you know nothing personally of these defendants.

JUROR: No.

THE COURT: Under those circumstances, with respect to these three defendants, can you render a fair [460] verdict and impartial verdict on the evidence with respect to these three defendants? JUROR: Well, I don't think I could, your Honor.

THE COURT: Why not; because you don't want to serve for 7 days? JUROR: Yes.

THE COURT: The reason I speak sharply to you, Mr. Brown is that I would speak sharply to any juror in the circumstances who told — and I am sure that all counsel support me — when you have just finished telling the Court that you know nothing about these three defendants and you next tell me you could not sit impartially.

JUROR: I would sit in —

THE COURT: Gentlemen, do you wish me to excuse this juror? MR. OWENS: Yes.

THE COURT: You are excused with a reprimand from the Court.

(Jury empanelling continued.)

(Bench conference re juror:)

JUROR: I just got off a ten day lockup last week, your Honor.

[461] THE COURT: Let me rule that that is something I have had in mind. Would you step back to your seat for a moment, please.

The reason I asked him to step back is that I did not want counsel to be expressing opinions in front of him concerning whether I should retain him or not which could possibly prejudice the position of counsel and client in the future with the case.

My inclination is not to excuse him though. It reeks of unfairness to be locked up twice in a month.

MR. NEWMAN: I didn't catch that.

THE COURT: He just got through with a 10-day lockup last week. This would be his second in one month, in every sense of the word, it is service above and beyond the call of duty.

You can express yourselves frankly since he is not within earshot.

MR. OWENS: My own personal opinion would be that if he were locked up, it would be unfair.

THE COURT: He could take it against the government too, the only party that has been common to both cases. Shall we excuse him?

[462] MR. MULDOON: I think it is fair.

THE COURT: Out of elementary fairness. All right, we will excuse him.

(Jury empanelling continued.)

(Bench conference re juror:)

THE COURT: Yes? JUROR: My husband is a police officer. Does that make any difference?

THE COURT: Well, it may or may not. Under the directions you are required to report it, if you will take your seat back there, we will see.

MR. MULDOON: The relationship? JUROR: My husband's first cousin.

THE COURT: And Doctor Ford the Medical Examiner; you are related to him? JUROR: My husband.

THE COURT: All right, thank you; you may take your seat.

THE COURT: There is some blood relationship. How close, I don't know. I don't intend to excuse the juror, but you have the information for whatever you wish to do.

MR. OWENS: Your Honor, may the record show that Juror No. 5, challenged by the Commonwealth is a black person?

[463] THE COURT: Yes, the record will show anything that is reasonable.

MR. MULDOON: May the record also show that counsel Owens is related to a police officer, and also, that the challenges of Attorney Owens were for three consecutive challenges with jurors 1, 2, 3, 4, and 5, to use up the 15 challenges.

THE COURT: The record shows all those things, gentlemen.

All right, the next juror? JUROR: I just got off a lockup and was asking if I could be excused.

THE COURT: What case? JUROR: Stewart.

THE COURT: Same problem, gentlemen.

MR. OWENS: I would say the same rule applies.

THE COURT: It is unfortunate. I would say he is a good man to hold. He is an experienced man.

(Empanelling continued.)

MR. DONNELLY: May we approach the bench again, your Honor? THE COURT: Yes.

(Bench conference recorded as follows:)

MR. DONNELLY: May the record show that Juror [464] No. 5 is black and was challenged by the Commonwealth?

THE COURT: The record will show that. I would suggest if that becomes a necessity for noting in the record, in the future that you can do so the next time up, rather than make a special trip.

MR. OWENS: Fine.

THE COURT: All right, Mr. Smith.

JUROR: Yes, I might be prejudiced in this case.

THE COURT: Do you know anything about these defendants? JUROR: No.

THE COURT: You have a problem in your own mind that would disqualify you? JUROR: Yes.

THE COURT: Gentlemen, I will inquire further, if you wish.

MR. OWENS: No.

MR. NEWMAN: No.

MR. DONNELLY: I am satisfied.

THE COURT: Mr. Muldoon?

MR. MULDOON: No, your Honor.

THE COURT: All right, you are excused, Mr. [465] Smith. Will you take your seat?

(Jury empanelling continued.)

THE COURT: I will see counsel.

JUROR: I would like to be excused because I suffer from hypertension.

THE COURT: You think a case of serious consequence would be such that it might have a bad influence on your health? JUROR: I do.

THE COURT: Are you under medical attention? JUROR: I am.

THE COURT: Taking medication. JUROR: Yes, I am.

THE COURT: Are there times when medication has difficulty in controlling you? JUROR: It has.

THE COURT: I will hear counsel. Any objection? MR. OWENS: No.

THE COURT: All right, you are excused.

JUROR: I live with 80 year old parents, and my father has arthritis and requires attention, and it would be a hardship on him if I were to serve.

THE COURT: Isn't there anybody else around? JUROR: No, I live alone with them.

[466] THE COURT: Is he confined to bed? JUROR: Off and on.

THE COURT: Is he confined to a wheelchair when he is up? JUROR: No.

THE COURT: Is your mother around and about? JUROR: She is 80 years old.

THE COURT: Well, of course we have three or four lucky Judges on the Court that are more than 80, and they do better

than I do coming up those hills. Would you take your seat back there for a moment?

MR. MULDOON: Your Honor, is the gentleman married? THE COURT: No, single. He lives with his parents. Borderline case, gentlemen. I will follow the request of counsel. If it were a matter of seating the last juror, I would decline to excuse him, so I will hear counsel.

MR. NEWMAN: I would be in favor of excusing him, your Honor.

MR. OWENS: I would.

MR. DONNELLY: I think he should be excused.

MR. MULDOON: The only thing I have in mind — [467] frankly, I don't think it is sufficient reason, but we did excuse a lady for the same reason earlier. I think in fairness —

THE COURT: Yes, her reason was much more cogent than this one. This would appear to be awfully thin. I have heard thousands of these, and this is thin.

Mr. Gillis, you are excused by the Court.

All right, the next juror. I assume Mrs. Royal is coming up to inform me that her husband is a correction officer in Suffolk County.

JUROR: Correct, your Honor.

THE COURT: As a matter of fact, I know him. Does anybody wish me to inquire further? Is there any further problem that you want to bring to the attention of the Court? JUROR: No, your Honor, just the fact that he does work at the Jail.

THE COURT: Anything further? MR. OWENS: No.

THE COURT: You may take your seat back in the box temporarily at least. Under the same ground rule, and circumstances, I am invoking the same rule. You have your information, and the Court stands neutral.

However, may I make on suggestion. At both [468] tables I have noticed exclamations of surprise and chagrin as various jurors took the box for one reason or another. It is difficult

enough to cope with the overall problems and keep these things on an even keel, so if you will, as this charade continues, and it always ends up as a charade — the jurors in the back of the room are getting amused as it continues, so that if you will try to keep poker faces, I would appreciate that, no matter who takes the box, whether it be the high Sheriff of Suffolk County or not, try to play it cool and keep a poker face. I would appreciate that.

(Empanelling continues.)

THE CLERK: Did you have something to say? JUROR: Yes, I have a nephew who is participating in police work.

THE COURT: He is a police officer? JUROR: Yes.

THE COURT: All right, that is the only problem. You may take your seat.

(Bench conference re jurors:)

JUROR: I will serve, your Honor, but I have a sick mother-in-law who had her leg amputated. If something came up, I would have to be with my wife.

[469] THE COURT: But with good luck you would have no problem.

JUROR: But if something did come up —

THE COURT: That is something that I would seriously consider at that time; that is why we empanel 15 jurors.

All right, No. 4 is next.

JUROR: My wife is a very sick person; she is a cardiac with high blood pressure, under the care of three doctors, and as soon as my daughter gets back, she will be operated on.

THE COURT: All right, gentlemen, I will hear you.

MR. OWENS: I have no objection.

THE COURT: All right, sir, you are excused from service.

JUROR: I have two children who are sick at home, your Honor. One has a strep throat, and they are both under medication. I don't mind 9:00 to 4:00, but my wife isn't capable of handling the situation herself.

MR. OWENS: I have no objection.

THE COURT: All right, Mr. Cater, you are excused.

[470] JUROR: Your Honor, I have what they call nephrosis of the kidneys and it requires medication four times a day. I am required to take to the hospital 24 hour urine specimens, and I have angina. I don't feel that I can serve overnight. If it were a matter of going home at night, I think I could.

THE COURT: Any problem? MR. OWENS: No objection.

THE COURT: All right, you are excused. Mr. Neddicks?

JUROR: I have an aunt and uncle at City Hospital, your Honor and they know this fellow that was involved in that incident.

THE COURT: Have you talked to them? JUROR: Yes, I have talked to my cousin.

THE COURT: Let me ask this, as I have asked before: Do you feel, based upon the knowledge or the prior conversation that you had concerning this case, or anybody concerned with it, that you could render a fair and impartial verdict based on the evidence in the courtroom? JUROR: I doubt it.

THE COURT: You doubt it? JUROR: Yes.

THE COURT: Gentlemen, unless I hear something [471] to the contrary, I will excuse the juror.

MR. OWENS: All right.

THE COURT: Thank you, you are excused.

THE CLERK: Juror No. 10, Joseph Banks.

THE COURT: Yes, Mr. Banks? JUROR: My wife works for the Boston Police Department.

THE COURT: An employee of the Boston police. JUROR: Yes.

THE COURT: All right, Mr. Banks, thank you. If you will take your seat back on the panel for the time being.

He is not excused, gentlemen.

Juror No. 11. Yes, Mr. Mansey. JUROR: Sir, I got two children at home, and my wife passed away and there is nobody to take care of them at night.

THE COURT: How old are they? JUROR: Twelve and fifteen, but my boy is incapacitated.

THE COURT: Gentlemen, I will hear you.

MR. OWENS: No objection.

THE COURT: All right, you are excused from service. Juror 13 next.

[472] JUROR: My mother has been seriously ill in the hospital. If I could be —

THE COURT: What is her problem? JUROR: She had a shock and a major operation.

THE COURT: How long has she been in the hospital? JUROR: About a month.

THE COURT: With good luck, and a good break, she will be all right for the next week or so? JUROR: It is possible.

THE COURT: If anything happened, I would consider excusing you — that is why we empanel 15 jurors.

JUROR: Okay, that is the main thing.

THE COURT: No. 14. Yes, Mr. Jensen? JUROR: I do a lot of work and have been down there two or three times a week. We have a lot of coin-operated equipment down there, and I know people down there.

THE COURT: Have you talked with them about this case? JUROR: I have with a few, yes.

THE COURT: Considering anything that you did know about the case, do you feel that you could render [473] a fair and impartial verdict? THE WITNESS: Yes.

THE COURT: On the evidence in the courtroom, and no other considerations? JUROR: Yes.

THE COURT: Could you be fair and impartial? JUROR: Yes.

THE COURT: All right, gentlemen, I will not excuse the juror based upon his answers. You may take your seat.

THE CLERK: Juror No. 15. Mr. Benson.

THE COURT: All right, Mr. Benson, what is the problem?

JUROR: I have a contractural obligation to meet by the end of this week, your Honor.

THE COURT: This week? JUROR: Yes.

THE COURT: A personal one, or in behalf of your employer? JUROR: It is my employer.

THE COURT: What would it involve in terms of yourself and your employer if you were unable to meet this? JUROR: Well, I am assembling a panel in my [474] home at night, and if I don't complete assembling it, he can't test it.

THE COURT: What does it involve financially: JUROR: $500.

THE COURT: Well, gentlemen, I will hear counsel. Would you take your seat for the moment, sir?

If he is going to suffer a $500 personal loss, somebody might bear the brunt of that.

MR. OWENS: I doubt if it will be the Commonwealth!

THE COURT: You never know. So all counsel agree that we should excuse Mr. Benson from service. All right, next juror.

JUROR: My nephew is a lawyer, your Honor.

THE COURT: Well, that is something that counsel may be guided by. Have you absorbed any of his knowledge? JUROR: Yes, I have.

THE COURT: Good. We will never know whether it is for good or bad. Do you live with the nephew? JUROR: No, but I see him all the time; maybe you know him.

THE COURT: The name is familiar; is it the [475] same? JUROR: No. Anthony DeFucia.

THE COURT: All right, you may take your seat. I guess Juror No. 9 is next. Yes, Mr. Brown?

JUROR: My wife works nights, and I have nobody with the kids.

THE COURT: How many children do you have? JUROR: I have six.

THE COURT: Is there somebody else that can take care of those children? JUROR: Not that I know of.

THE COURT: And she works what hours? JUROR: 11:00 to 7:00 in the morning.

THE COURT: And you work over at the V.A. during the day? JUROR: Yes.

THE COURT: All right, Mr. Brown, would you take your seat back there for awhile, please?

It is a problem, gentlemen, and I will leave it to counsel. I am sure that as in all such instances, the gentleman and his wife can make arrangements, and I shall not excuse him unless there is agreement among counsel that I should.

[476] MR. OWENS: I would rather retain him.

MR. NEWMAN: I would.

MR. MULDOON: I would like to see him excused. I think he should be excused. I feel it is an imposition on a man with six children. I have many children myself, and to expect them to be handled in some other way, or to impose additional expense upon him, I think is an imposition that we have not imposed upon others.

THE COURT: Yes, but the only difference is that — the only difference between this worthy case and others is that this is the first one I haven't had unanimity on. As a matter of fact, you abstained once when it was three to nothing, so you didn't even vote. However, I am sympathetic to Mr. Muldoon's statement. Would you rather have him retained?

MR. OWENS: I would, in view of the fact that the Commonwealth has challenged other black people.

THE COURT: Let the record show — no, let the record show nothing, but in the interest of avoiding controversy, we will not excuse the juror, and the Commonwealth has another way of showing its sympathy for the man.

MR. MULDOON: While I am here, I am willing [477] to have the record show that he was a colored gentleman,

and I also would like the record to show that on previous challenges by counsel for Ross, that 14 of the 15 jurors that were seated were challenged, and that the one remaining juror left in the panel at that time was a colored person.

THE COURT: Yes. Thank you. All right, next?

JUROR: On account of the work I do, I am a security officer for a detective agency.

THE COURT: All right, you may take your seat back on the panel.

Gentlemen, as with previous situations dealing with occupations, you have the information.

MR. OWENS: He lists himself as unemployed.

MR. MULDOON: Perhaps he was when the question was put to him.

THE COURT: I am quite content that Mr. Burns is not going to sit on the panel, so we will expedite it by excusing him. That is consistent with having excused — wait a minute, did we excuse somebody on security?

MR. OWENS: Yes, the first juror we excused.

MR. MULDOON: The woman seated presently in seat [478] No. 5, to my understanding, is the wife of a correction officer. She wasn't excused. Now whether or not that is the same situation —

MR. OWENS: You would have the right to challenge her.

MR. MULDOON: We are talking about excusing.

MR. DONNELLY: We had some discussion with the security officer.

THE COURT: She said substantially more than that. Didn't she say something about having discussed the case? She also had a second problem.

MR. MULDOON: No. I don't believe the lady was excused, if it is the same lady. Related to Doctor Ford, and also —

MR. DONNELLY: That wasn't the case. Where you said there might be a will contested, and her brother was a guard, but we did excuse her.

THE COURT: Mr. Muldoon, you wish to be heard? MR. MULDOON: I feel that there are similar instances. I have notations that people have been left on the panel. The man apparently hasn't been a security guard for any period of time, due to what is stated on the card.

[479] THE COURT: Well, in view of the Commonwealth's objection, we will leave Mr. Burns on the panel, and exception for the defendants is saved.

MR. OWENS: Thank you.

EXCEPTION No.'s. 22, 23, 24

THE COURT: Mr. Burns is not excused.

(Empanelling continued.)

THE COURT: I will see counsel.

(Bench conference recorded as follows:)

THE COURT: On this disputed one, I am going to put the direct question to Juror 15 as I did in one previous instance, whether he feels that he can bring a fair and impartial judgment based on the evidence in this case. Have him come over.

Mr. Burns, would you answer this question — the same question I put to the entire panel. Considering your background and job, and despite that, do you feel that you can render, as a juror, if you serve on this case, a fair and impartial verdict based upon the evidence that you hear, and no other consideration? JUROR: Yes, sir.

THE COURT: All right, you may return to the panel.

[480] (Bench conference concluded — empanelling continuing.)

THE COURT: All right, gentlemen.

(Bench conference as follows:)

THE COURT: Yes, Mr. Freitas? JUROR: Your Honor, I am a retired police officer of 30 years service.

THE COURT: Thank you, you may take your seat again on the panel.

MR. MULDOON: Could your Honor ask him the same question?

THE COURT: Let me put to you, Mr. Freitas, the same question that was put to the panel generally a few moments ago. Despite your police background, do you feel, or do you believe that you could return a fair and impartial verdict in this case based upon the evidence, and no other consideration? JUROR: I don't think so.

THE COURT: You don't. All right, gentlemen, I will hear a motion from either side.

MR. MULDOON: He may be excused.

THE COURT: You may be excused. Yes, Miss Glynn?

JUROR: I am under the care of physician for [481] emphysema.

THE COURT: Do you feel that being locked up in the sense that you would be living in a hotel, not being able to get home, do you feel that that would be an impediment? JUROR: I do, definitely.

THE COURT: Do you take medication? JUROR: Oh, yes.

THE COURT: And you see the doctor regularly? JUROR: Yes, I do.

THE COURT: Gentlemen?

MR. OWENS: I have no objection.

THE COURT: You are excused.

THE CLERK: 203, Albert Andrews?

JUROR: My wife is 63 years old and has a hip injury, and I have only a stepdaughter at home, and she works in police headquarters.

THE COURT: Your stepdaughter? JUROR: Yes, she lives with us.

THE COURT: With respect to your wife, could she get along reasonably well for a week? JUROR: I don't think so, sir.

THE COURT: Is it a matter of assisting her physically? [482] JUROR: Yes, at times.

THE COURT: Gentlemen?

MR. OWENS: I have no objection.

MR. MULDOON: No objection.

THE COURT: All right, you are excused from service.

JUROR: Thank you.

(Bench conference concluded — empanelling continued.)

THE COURT: Did you have something to say to the Court? JUROR: No.

THE COURT: Jury stands indifferent.

(Bench conference as follows:)

JUROR: Well, I have four small kids, and my wife is dead, and I don't have no one to take care of them. One of my boys is sick. I have to take him to a psychiatrist three times a week, and I would like to be there when he makes his examination.

THE COURT: All right, if you will take your seat back there for a moment.

JUROR: Thank you.

MR. OWENS: I understand it is a hardship, but in behalf of Williams, I would want to retain this person.

[483] THE COURT: What do you say?

MR. MULDOON: I think clearly in view of the previous excuses that this is a strong reason why this poor man should be excused. He has four small youngsters, and a widower, and one of them needs to go to a psychiatrist twice a week. I would ask that he be excused.

THE COURT: Gentlemen, it is simply good sense, with all due respect to his duties here as a juror, it is quite a burden to place upon him with psychiatric treatment of his boy twice a week. What do you say on the matter of hardship — of course it is entirely discretionary with the Court, but on the other hand, I do like to have counsel agree with me in exercising it.

MR. NEWMAN: I will agree.

MR. DONNELLY: Well, your Honor, the way the Government exercises its challenges —

THE COURT: This is not a matter of peremptory challenge. I follow your general line of reasoning, but we are discussing this individual situation now.

MR. DONNELLY: Let's be blunt. We need all the black people on that jury we can get! I would like to see him retained.

[484] THE COURT: What do you say, Mr. Owens? MR. OWENS: I would rather see him retained. If the Commonwealth feels strongly, they can challenge him.

THE COURT: Mr. Maryland, will you come back, please? Let me put a question to you for the assistance of the Court. In view of the personal difficulties that you have explained to the Court, particularly in view of the psychiatric visits that one of your boys is getting, do you feel that you could give fair attention to this case if you were confined for a week away from your children? JUROR: Well, I don't think so because he has sleeping spells too. Sometimes he will sleep for about 10 or 12 hours and you have to wake him up.

THE COURT: Your thought is that —

JUROR: I would be worried about him.

THE COURT: And your thought is that you could not bring attention to your duties as a juror under the circumstances? JUROR: Yes.

THE COURT: Gentlemen, I am going to excuse this juror. Anybody disagree?

MR. OWENS: Not in view of the last answer, I do not disagree.

[485] MR. DONNELLY: I don't.

THE COURT: You are excused.

MR. OWENS: The Government, in exercising its last peremptory challenges on Jurors 9, 10, and 12, were also black people.

THE COURT: Yes, the record will show that.

Gentlemen, we have exhausted our second group of veniremen, and so there is no point in proceeding further. I am going to give very brief instructions to these jurors who are going back to the pool, then brief instructions to these people to our left, and I am going to lock them up for the night.

It is unfortunate because they may not end up finally as jurors, but there is no help for that, if we are going to be consistent. These people at least have some reasonable chance of becoming jurors. Therefore, I think I will have to sequester them for the evening, and I will give them brief instructions, and we will start again at 10:00 o'clock in the morning.

The peremptory challenges of the Defendant Williams and Defendant Ross are exhausted, and Defendant Daniel has not yet begun to use his challenges.

MR. DONNELLY: That is right. It may help [486] you to know that the Defendant Daniel intends to challenge all but Juror No. 5. In view of that, you may want to change your statement that they should be locked up.

THE COURT: That is unfortunate in that the little lady in seat 5 would spend a lonesome evening.

MR. OWENS: If I may — don't know if I am out of line — but would the Court reconsider the decision to lock up this jury?

THE COURT: You mean as a matter of policy?

MR. OWENS: Yes.

THE COURT: Well, it was on motion of the Commonwealth. What do you say to that?

MR. MULDOON: At this time it becomes rather difficult with so many of the jurors being excused or challenged, and so many of them being informed that it would be a lockup.

THE COURT: No, your reasons for requesting a lockup were well taken in the first instance. I don't want you to abandon them. I just wanted to know if you yourself had changed.

MR. MULDOON: I haven't honestly.

THE COURT: All right, there are no further jurors available. You appreciate, Mr. Donnelly, that if [487] I were to allow you to exert your challenges at this time, actually we would be working out of order because the Commonwealth should in propriety be allowed and required to exercise its challenges as to the four seats which we have excused — four seats are still empty, so in view of that, I am going to lock up these people in order that we can continue to operate consistently and without requiring counsel to make any unnecessary waivers of their position. So we will give them a night on the Commonwealth.

(Bench conference concluded.)

THE COURT: May I have the attention of all jurors, those who have left the box and who are not going to serve — that means all seated at the back of the room, and to the side of the room.

You cannot serve on this jury for various reasons, and those of you who by reason of the fact that you are still seated in the box may serve on this jury.

May I say this to the eleven jurors sitting in the box to the left. You are subject to being sequestered as of now. You may or may not, by reason of this complex challenging process and complex seating process — you may or may not end up ultimately sitting on this jury. Tomorrow we will know better about that. [488] I understand that you will be staying in very comfortable quarters in the Parker House.

Now let me say this to both the jurors in the box, and to the rest of you in the room. I reiterate the Court's direction that you are not to discuss this case, whether you are seated or potentially seated in this case or not. You are not to discuss this case with anyone, with other jurors in the jury pool, or with anybody else, until further order of the Court which will be communicated to you by the Court Officers.

This is a confidential matter between the parties, the Court, and yourselves, so you are not to discuss it when you go back to the jury pool room tomorrow morning, those of you who are to report to the jury pool in the morning. You are not to discuss it with anyone up there until further order of the Court.

That, of course, is also appropriate and applicable to the 11 jurors sitting to my left. You are not to discuss it among yourselves until further order of the Court.

If there are any questions from counsel, I will see you. Is there anything further to be said at this time?

[489] MR. OWENS: No, your Honor.

THE COURT Recess.

(Court adjourned.)

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[492] (Jury empanelling continued:)

THE COURT: Ladies and gentlemen, my name is Judge Hennessey, and we have a number of indictments here to be tried together, and I want to introduce counsel for your information.

Presenting the cases for the Commonwealth will be Assistant District Attorney Muldoon, and appearing for the defendants respectively will be Mr. Owens, Mr. Newman, and Mr. Donnelly.

I want to state to you that the first direction of the Court as prospective jurors is that you are directed that from this time until further order of the Court, you are not to talk about this case or anything that went on in this courtroom, or anything about the empanelling of the case until further notice.

This is true, whether or not you are selected upon the jury in this case or not. In short, it is true when you go back to the jury pool upstairs. You are not to discuss this case with any of them, or with anybody else.

This case involves three defendants, James Williams, James Ross, and Roy Daniels Jr. It also [493] involves allegations that a Boston University security guard named Timothy Lehane, l-e-h-a-n-e was allegedly assaulted and stabbed a number of times near one of the Boston University school buildings in the vicinity of Commonwealth Avenue near Kenmore Square.

The Clerk is going to ask you, after you are seated in the box as a potential juror, three questions. The first of these questions will be as follows:

If any of you are related to the defendants or to the victim, or if any of you have any interest in this case, or have formed an opinion or is sensible of any bias or prejudice, you should make it known to the court at this time.

The second question is as follows: Is there any serious reason why you cannot serve upon this jury, considering that you will be locked up, living in a hotel away from home for about a week.

The third question which the Clerk will address to you is as follows: Are you presently, or have you in the past worked for a police department or a district attorney's office, or do you have any relative who is or was engaged in such work.

Let me expound a little on each of those questions.

[494] With respect to the first one which in essence is the question which asked you — or is a question which is asked of you this month on any case upon which you have sat as a juror, criminal or civil. What that question in essence does, in addition to the particular parts of the question, is ask you if you can sit fairly and impartially on the case.

Can you under oath return a fair and impartial verdict based upon the evidence that you hear in the courtroom, and not on any extraneous factors; no bias or prejudice or personal interest in the case, and no prejudice of any kind.

You will recall that when you took your oath, that it was probably impressed upon you the first day that you arrived here, and perhaps has been emphasized many times by Judges throughout the month, that you were told that under your oath, you have an absolute duty to render a fair and impartial verdicts based upon the evidence that you hear in the courtroom, and no extraneous factors.

The Clerk in asking you the first question is giving you an opportunity to inform the Court, if you believe that you cannot render a fair and impartial verdict on the evidence in this case; giving [495] you an opportunity to inform the Court if you have serious doubt as to whether you can render a fair and impartial verdict on the evidence in the case.

Under this question, and under your oath, when this question is asked, if you believe that you cannot render a fair and impartial verdict on the evidence in this case, or if you have a doubt as to whether you can so render a fair and impartial verdict on the evidence in the case, you have a duty to inform the Court when that question is asked by standing or raising your hand.

With reference to that first question, let me tell you, there was certain publicity about this case, this incident, when it first occurred, and let me say this with respect to your answer to this question. Mere exposure to such publicity, mere knowledge of some of the facts of the incident, or details as outlined by the press, the radio and news media, does not require you to inform the Court that you are unable to reach a fair and impartial verdict.

It is only if you have private knowledge from the news media, or some other sources about this case which causes you to believe that you cannot render a fair [496] and impartial verdict on the evidence, or which makes you doubtful as to whether you can render a fair and impartial verdict. It is only

in that instance that you are required to bring to the attention of the Court in answer to the first question.

In addition to examining whatever you know from the news media in terms of this first question which the Clerk will put to you, I would direct you to examine all aspects of the case and everything that you presently know about the case, both in this courtroom and from what I have told you so far, and determine whether you should inform the Court as to whether you cannot return a fair and impartial verdict, or whether you have a doubt as to your capacity to render a fair and impartial verdict based upon the evidence in the case.

The second question informs you that the jury will be locked up at the Parker House, living away from home for about a week. You perhaps know that the Court Officers will make immediate efforts to get toilet articles and clothing and such things from your home as will make you comfortable during that time, but I do direct your attention to the fact that you have the right to address the Court by rising or [497] raising your hand when the Clerk asks that question, if there is a serious reason why you cannot serve upon this jury for health or other reasons, considering you would be locked up for one week.

The third question asks you if you have in the past worked for a police department or district attorney's office or do you have any relative who is or was engaged in such work. That is plain on its face. You are to give that information to the Court if it applies to you when the question is asked. By relative, we mean a member of your immediate family; husband, wife, son, daughter, father, or mother.

All right, Mr. Voke, we will proceed.

THE COURT: While Mr. Voke is doing that, let me inform you that each of these three defendants is charged with three crimes under these indictments. Each is charged with armed robbery, assault with intent to murder, while armed, and

assault and battery by means of a dangerous weapon. There are nine indictments in all.

(Empanelling continuing.)

THE COURT: Up here, gentlemen.

(Bench conference as follows:)

THE COURT: What is the problem? [498] JUROR: I have a daughter that is a police officer up in Tewksbury, and also a bum back. I have three discs removed from my spine.

THE COURT: Well, what effect does the back —

JUROR: I have to sleep on a board.

THE COURT: I will hear you, gentlemen.

MR. OWENS: I have no objection.

THE COURT: You are excused. You may take your seat at the back.

THE COURT: All right, Mrs. Glennon, what is your problem? JUROR: I have a husband at home that doesn't see too well, and he is sick with polio, and lame. He doesn't get around. I could never leave him overnight.

THE COURT: Are you the only one available to take care of him? JUROR: Yes.

MR. OWENS: No objection.

THE COURT: All right, by agreement of the parties, you are excused. You may take your seat in the back of the room.

THE CLERK: Juror No. 10, Mr. Cardoza.

THE COURT: Yes, Mr. Cardoza.

[499] JUROR: I have hardening of the arteries, and my urine — and I have a boy at home that is retarded.

THE COURT: What problem does the hardening of the arteries give you? JUROR: I can't walk — I have to walk 20 feet and stop and rest.

THE COURT: I see, and the boy at home, is he a problem for your personal care? JUROR: Yes, sir.

THE COURT: And what else? JUROR: I am a widower too.

THE COURT: Gentlemen?

MR. OWENS: I have no objection.

THE COURT: All right, excused by agreement of the parties.

JUROR: Your Honor, I have a brother who is a member of the Boston Police Department. I don't think I could —

THE COURT: You have a problem of conscience? THE JUROR: I definitely would.

THE COURT: Gentlemen?

MR. DONNELLY: No problem.

THE COURT: All right, it is not necessary for me to ask the second question.

[500] MR. MULDOON: No, I think it is clear.

THE COURT: All right Mr. O'Brien, you may take your seat. Yes?

JUROR: My mother is all alone and she is 65 and a widow, and I can't afford to leave her alone, locked up. Otherwise, I would'nt mind serving. She has to do all her shopping, and she is arthritic, so I don't know.

THE COURT: Gentlemen?

MR. OWENS: I have no objection.

THE COURT: All right, you are excused.

JUROR: Thank you, sir.

THE COURT: Yes, Miss Wilson? JUROR: I don't know if this is serious, but I have an 86 year old mother and father that have to do all — I have to do all the shopping for them. A week, I might be able to do it, but I wouldn't want to go any further than that.

THE COURT: Let me put it to you this way: Would they get along reasonably well without you? Are they healthy enough? JUROR: I do all the shopping.

THE COURT: But in terms of their being able [501] to take care of their personal needs? JUROR: Oh, yes.

THE COURT: I would think that you should sit under those circumstances.

JUROR: They are not bedridden.

THE COURT: You don't have any practical fear for their health? JUROR: No.

THE COURT: All right, I am glad you brought it to my attention, but I think you should sit, if otherwise qualified.

(Bench conference concluded — empanelling continuing.)

THE COURT: All right, gentlemen, I will see you.

(Bench conference as follows:)

THE COURT: Yes, Mr. Bender? JUROR: Your Honor, on this particular case only, I have already pre-formed an opinion.

THE COURT: Based upon what you know about it? JUROR: Yes.

THE COURT: You don't know anything about these defendants? JUROR: No, but I have already formed an opinion.

[502] THE COURT: Gentlemen? I will inquire further, if you wish.

MR. OWENS: No.

THE COURT: All right, no objection appearing, and no inquiry being further indicated, we will excuse Mr. Bender, and you can take your place in the back of the room.

THE CLERK: Mr. Kinney?

THE COURT: All right, Mr. Kinney.

JUROR: Your Honor, my wife is home seriously ill resulting from phlebitis operation, and I have been instructed by the doctors that if she develops swelling or redness, I am to get her in there right away.

THE COURT: How recent was the operation? JUROR: About a month ago, sir. They claim it will be six months before she is back to normal.

THE COURT: You would be upset in your own mind if you had to leave her for a week? JUROR: No doubt I would, sir.

MR. OWENS: No objection.

THE COURT: All right, excused by agreement.

THE CLERK: Lillian Parker.

THE COURT: All right, Miss Parker.

[503] JUROR: Your Honor, my husband is a security guard for Pinkerton.

THE COURT: All right, thank you. Would you take your seat back in the jury panel. To save another trip up, let me ask you, without regard to your husband's position, and any other problem that you may have, and without regard to anything —

JUROR: I think I would be very biased.

THE COURT: Well, you have answered my question.

JUROR: I figured you were going to ask me that!

THE COURT: You feel you could not bring in a fair and impartial mind to the case? JUROR: Yes.

THE COURT: You are excused.

MR. OWENS: No problem, your Honor.

JUROR: Your Honor, I couldn't do justice to these three men because I do business with Boston University. It has been well discussed, and I am friendly —

THE COURT: This is Mr. Hoy. Well, based upon everything that you know about the case, your relationship to B.U., let me ask you this, for the [504] record. Do you feel that you could return a fair and impartial verdict based upon the evidence in the case, and nothing else? JUROR: I don't really think I could.

THE COURT: Gentlemen?

MR. OWENS: I have no problem.

THE COURT: All right, Mr. Hoy, you are excused from service.

JUROR: Your Honor, I am an Orthodox Jew, and I don't eat anything out, so it would be impossible for me to serve.

THE COURT: You feel that in a typical hotel, eating from the typical menu, that it would be impossible to satisfy your

dict? JUROR: I never did anything like this. It is against my religion.

MR. NEWMAN: No objection.

THE COURT: You are excused. Mr. Sweeney, those jurors that have been challenged or excused may go back to the jury pool. These jurors who are still seated in the box will remain with us for further proceedings, of course, and you will bring another group down as soon as possible.

[505] OFFICER SWEENEY: I have been in touch with Mr. Connors, and he informs me he doesn't have any available and he asks the Court to indulge him. In fifteen minutes he should have possibly 12 more.

THE COURT: Fine, recess.

(Court took a recess.)

(Lobby conference as follows:)

MR. MULDOON: This is at my request, your Honor. I was going to ask, in view of the 2:00 o'clock date to return to court, I was going to present a motion for a view, and if your Honor would consider the motion, or would allow the motion, in that case I would ask that the witnesses be excused until tomorrow morning. They have been sitting out here day after day now.

THE COURT: Do you feel that if we had the jury empanelled sometime between 2:00 and 3:00, do you feel it would be practical to attempt the view this afternoon? MR. MULDOON: Yes, I do. I don't think it would be very lengthy. I would just have in mind the Texaco station, Commonwealth Avenue, up to the B.U. communications [506] building.

THE COURT: You could schedule your bus for 2:30, then by reason of the time problem, it seems impracticable — it could be re-scheduled for tomorrow if the time gets off schedule. You could have the bus here at 2:30 and excuse your witnesses.

What do you gentlemen say as to the view? Is there any opposition?

MR. OWENS: I would have opposition to any motion for a view because I think the evidence being introduced, I don't see where a view is going to help the Commonwealth's case at all. The witnesses have testified on the voir dire as to where the Texaco station is, going around the corner. It has been very descriptive as to names of streets, where this B.U. building is located. I simply can't see any practical result of taking a view.

Hopefully it is not going to be a very lengthy trial, but I think we are just prolonging the whole thing.

THE COURT: What locale did you have in mind, Mr. Muldoon? MR. MULDOON: The communications building which is diagonally opposite, perhaps several hundred [507] yards up on the other side of the street. Just that area from Kenmore Square up to the B.U. communications building. Specifically, the Texaco station, and view from the Texaco station over to the communications building, and the ride that is alleged to have taken place up Commonwealth Avenue and left at Peter Pan, and down Hinsdale Street to in front of the communications building. I don't feel there is any other area that would be directly involved.

THE COURT: You are speaking of the logistics as between the one site and the other rather than anything peculiar to either site.

MR. MULDOON: Well, in addition —

THE COURT: Distance and time.

MR. MULDOON: Distance and time, plus possible lighting that may be seen in the area, and also in front of the B.U. building where the incident is alleged to have occurred — there is an embankment there.

THE COURT: Let me leave it with you this way. In recognition of problems of these gentlemen, who speak, I think, warrantably about the unusual length of the trial,

which is nobody's fault — if [508] anything, it is the fault of the administration of the jury pool right at the moment. But let's leave it this way: We will take a middle ground on it. If the view, timewise, can be practically accomplished this afternoon, then we will take it. If it involves taking the view tomorrow morning, then I will deny the motion. I think that is fair. I would be willing to sign an affidavit, without knowing the facts, but none of these gentlemen are going to get rich on this case.

MR. OWENS: Exactly, your Honor.

THE COURT: And, of course, that is also recognizing that they have other interests besides money in the case, but that is a factor. Let's leave it this way: If we take it this afternoon, if not this afternoon, by reason of the time that it takes to empanel the jury, motion is denied, and I don't expect anyone to overlook his problems with the empanelling process just to suit the view problem.

MR. MULDOON: In any event, will the evidence commence tomorrow morning?

THE COURT: You are free to excuse your witnesses. [509] By the time you have made an opening, and by the time we empanel, we would kill the afternoon anyway probably. Why don't you excuse your witnesses and order a bus, and we would hope that we get through and onto the view.

MR. OWENS: Also, your Honor, along the same line, if there is a view, in behalf of my client, James Williams, I would not want him to go on the view with us.

THE COURT: If there is a view taken, gentlemen, I would suggest that you discuss with your clients that problem. I don't suggest that you urge them to waive their right, but I do say that there is the problem of security, and I would assume that the Sheriff will have handcuffs and possibly other restraints on them.

If they go on the view, under those circumstances, I suggest it doesn't make sense. They are represented by counsel, and they appear before the jury in very unfavorable circumstances.

However, it is their privilege. If they do waive their right to go, I would want that in open court, after the jury is excused, and on the record. I simply regard it as unwise for a defendant [510] who is in custody to go on a view, but I don't urge that upon anybody else. You and your clients make your own decisions on that. Anything else for the record? I hope everybody will be on time at 2:00.

MR. MULDOON: I apologize for this morning, but I was called to the 1st Session.

(Lobby conference concluded.)

(Court adjourned until 2:00 p.m.)

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[511] AFTERNOON SESSION

(Empanelling continuing.)

THE COURT: Ladies and gentlemen, let me give you some information about the cases which are about to be tried in this session.

I am Judge Hennessey. Representing the Commonwealth is the Assistant District Attorney, Mr. Muldoon. Representing the defendants respectively, Mr. Owens, Mr. Newman, and Mr. Donnelly.

Let me direct you first of all with respect to these cases about which you are to get some information; that you are not to discuss these cases, or the empaneling procedures, or what goes on in this room with anybody else, even though you may not be selected to sit on the jury.

In other words, when you return to the jury pool, you are not to discuss what went on downstairs here in this room with any fellow jurors, or anybody else upstairs.

I am sure that you will obey that direction. It is quite necessary in empanelling in a case such as this where several groups of jurors have to be called down to the courtroom.

[512] Now, these cases involve three defendants whose names are James Ross, James Williams, and Roy Daniels, Jr.

Each of these defendants is charged with three offences in three indictments. Each of them is charged with armed Robbery, and each of them is charged with assault with intent to murder while armed, and each is charged with assault and battery by means of a dangerous weapon.

The Commonwealth alleges that the victim of these assaults was a Boston University security guard named Timothy Lehane, l-e-h-a-n-e.

The Commonwealth alleges that the alleged assault and attack took place near a Boston University school building located in the general area of Commonwealth Avenue and Kenmore Square, and that the victim was allegedly assaulted and stabbed a number of times.

Now the clerk when you take your seat in the box, as you are called, will ask you three questions. These will be as follows.

First, if any of you are related to the defendants or to the victim, or if any of you have any interest in this case or have expressed or formed an [513] opinion or is sensible of any bias or prejudice, and if so, please make it known to the Court at this time, when you are called upon.

And the second question will read as follows: Is there any serious reason why you cannot serve upon this jury considering that you will be locked up, living in a hotel away from home for about a week?

And third, are you presently or have you in the past worked for a police department or a district attorney's office, or do you have any relative who is or was engaged in such work.

Now, to discuss for a few moments the implications, so far as you are concerned of question No. 1.

This question is addressed generally as you already know from listening to other Judges this month, I am sure, to the principal requirement of your oath as a juror, which is that you would return a fair and impartial verdict upon the evidence and upon no other factors.

When the Clerk asks you this first question to which I have reference, you will consider with reference to these indictments against these defendants, [513] first of all, whether you have been exposed to any publicity from the radio, television, or newspapers concerning this incident and these indictments.

It is not automatic that you are disqualified from serving on the jury if you have some memory of being exposed to some publicity concerning these indictments. It is only some prior knowledge of the publicity or otherwise of these cases that would render it in your mind impossible for you to render a fair and impartial verdict upon the evidence that you hear in the courtroom, in which case you would be disqualified from service.

So when the Clerk addresses that question to you, I would direct you to do this: examine from the standpoint of any prior knowledge by way of publicity or anything else that has come to your attention, and examine everything else that you know about this case, publicity or otherwise, and examine it from the standpoint of your intellect and conscience and determine whether you are in a position wherein you must follow the Court's direction and bring to the Court's attention that you cannot return a fiar and impartial verdict based upon the evidence in the case, [515] or that you have a doubt, a serious doubt in your mind that you could return a fair and impartial verdict upon the evidence that you hear in the case.

If either is the case, a conviction that you cannot be fair and impartial on the evidence, or that you have a serious

doubt as to whether you could be fair and impartial on the evidence, you must bring it to the Court's attention by rising or by raising your hand when the Clerk reads the first question.

Now, the second question invites your attention to the fact that this will be a locked up jury for about a week. The jury will be living at the Parker House in comfortable circumstances. The court officers will make, as they always have, efficient and prompt provision for getting such clothing and toilet articles from your home as are necessary.

However, if you have a serious reason, and I emphasize serious, why you cannot serve in such locked up capacity for a week, you have the privilege of bringing it to the attention of the Court by rising or raising your hand when the Clerk asks that [516] question.

The third one brings to your attention the question as to whether you do now or have in the past worked for a law enforcement agency, or do you have an immediate relative who does now or has in the past worked for such a law enforcement agency. If that is the case, and I refer to immediate relative: father, mother, daughter, son, husband, or wife — if that is the case, bring it to the attention of the Court when the third question is asked.

All right, Mr. Voke.

(jury empanelling continuing.)

(Bench conference as follows re jurors:)

JUROR: My wife has been confined since Sunday, so I have three small children from the ages of 12 to 5.

THE COURT: Gentlemen, any problem?

MR. OWENS: I have no objection.

THE COURT: All right, you are excused from service on this panel, Mr. Holland, thank you. The next one?

JUROR: My husband has been sick, and I don't want to serve or be away from him.

THE COURT: What is the trouble? [517] JUROR: He has had three operations. He is back to work, but —

THE COURT: Would it be a source of upset to you? JUROR: Yes.

THE COURT: If you were away from him? Gentlemen, I will hear you.

MR. OWENS: I have no objection.

MR. DONNELLY: No objection.

MR. MULDOON: No objection.

THE COURT: You may take your seat at the back of the room.

THE CLERK: Katherine B. Flynn.

THE COURT: Yes, Miss Flynn? JUROR: I live alone, and I Have a visitor from Mobile, Alabama that is going to be here for a week, and I would have to be home in the evening.

THE COURT: You have people living in your home? JUROR: Nobody; I live alone, but she is out there.

THE COURT: Visiting. All right.

MR. OWENS: I have no objection.

THE COURT: All right, take your seat at the back of the room, please.

[518] THE COURT: Yes, what is the problem? JUROR: I take nerve pills and sleeping pills every night.

THE COURT: Yes? You have a problem with your nervous system? JUROR: Yes. I have high blood pressure.

THE COURT: Hypertension. Do you take medication for that? JUROR: Yes, and i have a Dr. Beal in Hyde Park.

THE COURT: Would it be a serious problem to you? JUROR: Yes, it makes my blood pressure go up.

THE COURT: Gentlemen, I see no problem.

MR. OWENS: I have no objection.

THE COURT: You are excused. Take your seat in the back.

THE CLERK: No. 14, John Feeney.

THE COURT: Yes, Mr. Feeney.

JUROR: I am buying a home, and I will be passing papers either Friday or the start of the week.

THE COURT: Either Friday or Monday. And it [519] couldn't be delayed in any way? JUROR: It could be, I suppose.

THE COURT: I can recall some of the difficulties in getting such matters scheduled. I will hear counsel.

MR. NEWMAN: I respect his obligation.

THE COURT: You are excused, and you may take your seat at the back of the room.

(Bench conference concluded.)

THE COURT: All right. The last five jurors seated may address the Court as to any of the three questions. I assume those seated prior to that time may have something to say to the Court about Question No. 3 concerning work in law enforcement agencies. Which was the first hand — second row?

(Bench conference as follows:)

JUROR: I served as a police officer in Dublin City for four years.

THE COURT: Mr. McMann served as a policeman for four years in Dublin.

MR. MULDOON: When? JUROR: Ten years ago.

THE COURT: Let me ask you this. In your own mind, do you feel that you could render a fair and [520] impartial verdict as to these cases upon the evidence that you heard? JUROR: No, I don't think so.

THE COURT: Gentlemen? All right, you are excused.

THE CLERK: No. 10, Mr. Cambole.

THE COURT: Yes? JUROR: I just got off a lockup. I don't think I could sit through another one. I would be a raving nut! My wife has 7 kids!

MR. OWENS: No objection.

THE COURT: That is service above and beyond the call to duty. Excused.

THE CLERK: No. 12, Mr. Devoy.

JUROR: I have a brother who is a Boston police officer.

THE COURT: With respect to this case, do you believe that you can render a fair and impartial verdict upon the evidence in the case? JUROR: Yes.

THE COURT: All right, if you will take your seat back there, we will see. He is not excused, gentlemen.

JUROR: My husband is affiliated with a [521] security guard service.

THE COURT: Do you believe that you could render a fair and impartial verdict upon the evidence presented in the courtroom, and upon no other consideration? JUROR: In this particular case, I don't think so.

THE COURT: You would have difficulty making up your mind that you could? JUROR: I might be.

THE COURT: All right, I see no problem with this juror, gentlemen. I am going to excuse the juror unless I hear objection.

MR. MULDOON: No objection.

THE COURT: You are excused.

(Bench conference concluded.)

(Empanelling continuing.)

THE COURT: All right, gentlemen.

(Bench conference recorded as follows:)

JUROR: Your Honor, I have two things. One, I have read about the case and I have formed an opinion. I thought it was a very viscious case. The second reason was, I was on the lockup of the Stewart murder case for ten days.

[522] THE COURT: Entirely aside from prior knowledge, is there any problem, gentlemen, consistent with the attitude of counsel as to the lockup of the Stewart case?

MR. OWENS: No problem.

THE COURT: All right, Mr. McCarthy, you may take your seat in the back of the room. Yes, Mr. Crutch?

JUROR: My wife got out of the hospital with a hysterectomy, and my daughter is a nurse taking care of her in the day, and I have been taking care of her at night.

THE COURT: You have been acting as a practical nurse at night? JUROR: Yes.

THE COURT: Do you consider that it would be unfair if you were not there? JUROR: Yes, sir.

THE COURT: And a source of worry to you. JUROR: That is right.

THE COURT: Gentlemen, I see no problem. All right, you are excused. All right, next?

JUROR: I am an armed senior guard at the [523] Federal Reserve Bank in Boston, and special police officer for the City of Boston.

THE COURT: Do you feel that you could render an impartial verdict upon the evidence presented in this courtroom? JUROR: I feel I could, yes, sir.

THE COURT: You feel you could? JUROR: I feel I could.

THE COURT: Regardless of any status you might have. All right, sir, you may take your seat. The next one? Yes, Mrs. Carris.

JUROR: I am a widow, and I live with my daughter who has two babies, and she is not well. She depends upon me for help. Her husband works nights, and it would be impossible for me to be locked up.

THE COURT: You feel it would be a — you think it would affect her health? JUROR: Well, she has got two infants, and it is awful hard for her. She depends upon me for help. Her husband works nights.

THE COURT: Would you take your seat there, and we will talk about it over here.

Gentlemen, in terms of what we call excuses, that falls in what I usually categorize as subterfuge. [524] However, I will leave it up to you. Sometimes the juror who offers such a weak excuse is better off being excused, on terms of attitude of the juror, but I will leave it up to counsel — whatever you say.

MR. OWENS: I would have no objection to her being excused.

MR. MULDOON: Fine; no objection.

THE COURT: By agreement of counsel, the lady is excused.

THE CLERK: Mr. McMahon.

JUROR: I just buried my mother and brother 11 days apart from each other, and I can't see being a week away from my wife and two kids.

THE COURT: That was your brother and mother? Just before you took service in the jury? JUROR: Yes, sir.

MR. OWENS: I have no objection.

THE COURT: All right, by agreement of the parties, Mr. McMahon is excused.

JUROR: Thank you, very much.

JUROR: My boy is a security guard from one of these security companies, and he got beat up and received a broken nose.

THE COURT: With respect to these cases, and [525] the information that you have about them to this point, do you believe that you could render a fair and impartial verdict on these cases, based on the evidence and nothing else? JUROR: No, I would probably have my son in mind at that time.

THE COURT: Gentlemen, in view of the statement of the juror, I believe we should excuse here. All right.

JUROR: I am a nervous guy, and on a lockup — I take nervous pills.

THE COURT: You have trouble with your nerves, and you are taking pills for your nerves? JUROR: Yes.

THE COURT: Under a doctor's care? JUROR: Yes.

THE COURT: Do you feel it would be a source of upset and perhaps illness if you were locked up for a week? JUROR: It might be.

THE COURT: Gentlemen, under the circumstances, it seems appropriate to excuse Mr. Greco. Is there anything further to be said?

MR. OWENS: I have no objection.

[526] THE COURT: No objection appearing, Mr. Greco is excused.

(Bench conference concluded.)

THE COURT: To the jurors sitting in the back, as well as those seated on the panel, I would remind you once again of the direction that I gave you when you first entered the room; that is, that the Court directs you not to discuss this case among yourselves, or with anyone else when you get back to the jury pool.

That is absolutely necessary, and I know that you will observe that. The jurors in the back are excused to the jury pool, and you can make these 14 ladies and gentlemen comfortable upstairs while we take a short recess.

(Court took a recess.)

(Lobby conference recorded as follows at 3:00 p.m.)

THE COURT: Gentlemen, under the circumstances, I regret that it is apparent that we will have to cancel the view. It is unfortunate. Why don't we wait until John Sweeney reports back. It is possible he has rounded up another group of jurors throughout the building, or from the pool.

[527] Apparently the demands for jurors from the 8th and 9th sessions are such that we will be working on this tomorrow also, which is more than anybody bargained for, I am sure. We will see what he has to report.

Any luck, John?

OFFICER SWEENEY: I am afraid we won't be able to get another available juror until 10:00 o'clock tomorrow morning. We have exhausted everyone in the pool again that hasn't been called.

THE COURT: Well, you can break the bad news to those 14 that we have there. They are locked up, and will stay at the Parker House.

You fellows are doing more work on this than you normally do.

OFFICER SWEENEY: That's our job; we get paid for it.

THE COURT: Would you tell Tom to send us another group the first thing in the morning? I would think in fairness he could send us 36 to 40 more if he has them in the morning. Even if another session had to wait, we would get them back promptly. As we dispose of them, we could send them back so we will start them back up to him as soon as we can. If he had 30 or 40, [528] and could send them to us, we would get a good portion back to him by 10:30.

MR. SWEENEY: I will explain it to him.

THE COURT: Well, that is unfortunate, gentlemen. Is there anything further we can do at this time?

MR. OWENS: No. Only in behalf of James Williams, I was going — after the jury was empanelled, to reuqest the Court to take this matter under Chapter 278, 33A to G.

THE COURT: Well, you appreciate that with respect to those, I didn't deny those motions.

MR. OWENS: I understand that, your Honor.

THE COURT: I am simply taking them under advisement, which is my usual ruling on those, and this is for your information and for your guidance.

I usually find that most such motions are moot by reason of one thing or another before the case gets too far along. If they do not — in other words — if they become a problem to counsel, I invariably allow them.

In the case of a substantial question of law, particularly where indigents are involved, or some indigents are involved, and where the substantial question of law creates at least the start of a practical [529] appeal, I have no problem with the motion, but I do find that 19 times out of 20, the motion does become moot before I have to consider it seriously. You need not address yourself to that for the time being.

MR. OWENS: Once the evidence starts to unfold to the jury, I have to make certain notes on various exceptions I have taken. That is the reason why I brought it to the Court's attention at this time.

THE COURT: You may consider it, for your information, that all that you must consider in your mind is the motion under Chapter 278 — it is a reasonable and practical motion — and if there is a reasonable and practical chance of appealing the case, there is no problem.

MR. OWENS: Fine.

THE COURT: We don't play games with that.

(Court adjourned.)

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[530] (Jury empanelling continuing.)

(Lobby conference as follows:)

THE COURT: Gentlemen, all I can do, with expressions of regret, is to excuse you on half hour call, and particularly this puts the government in a peculiar position because you don't know whether to hold your witnesses or not. Why don't you hold half a day's evidence until 1:00 o'clock and we can check with John.

Aside from that, the only problem you gentlemen have is to excuse — or make yourselves available on a half hour's notice from John Voke, to come up on 30 minutes notice.

The best word that we have — and we always live in hope — is that another small contingent of jurors will be released by some session possibly by 1:00 o'clock or 2:00. Therefore, it

isn't fair to you men to hold you here, so let's have it that way. We will pick up some other business here for the day, if possible, in session, but we will suspend that business at any time if it appears that we have more [531] jurors available.

I could send to the highways, but I dislike to do that.

MR. NEWMAN: There is only one more spot we have to fill, unless Mr. Muldoon challenges. I was going to suggest the highways.

THE COURT: No, I don't want to preclude the Commonwealth. I wouldn't want the Commonwealth to be in a position where it had to declare in advance that by reason of limited number of jurors, it accepts the jury as is. There are only two jurors that we have not combed upstairs. I won't ask the Commonwealth to make such a declaration. If it wanted to voluntarily make it, that would be one thing, but I would regard it unusual, with the challenging that has gone on, to say to the Commonwealth, "Do you accept the jury as it now stands?"

I won't do that, as convenient as it might be, but in any case we will excuse you with the idea in mind that you will be available on 30 minutes notice to return. In the meantime, keep a half a day's evidence available until 1:00 o'clock.

MR. MULDOON: Yes.

THE COURT: And we will attempt at 1:00 to call [532] you one way or the other as to whether you are excused for the day.

So you will be available at 1:00 o'clock for Mr. Voke's call, whether you are needed at 2:00, or whether you are excused for the day at that time. So he will call you definitely at 1:00. He may be calling you earlier on 30 minutes notice. That is the best we can do.

MR. OWENS: Thank you, your Honor.

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[533] (Jury empanelling continuing at 10:35 a.m.)

THE COURT: Now, ladies and gentlemen seated in the back of the room, let me give you a few preliminary statements, mostly by way of information as to this case which is presently before us.

The defendants here are three in number, and their names are James Williams, James Ross, and Roy Daniels, Jr.

The circumstances which the Commonwealth alleges here, so far as your present information is concerned, and necessity for present information, is that the Commonwealth alleges that a certain Boston University security guard, Timothy Lehane, l-e-h-a-n-e, was assaulted and stabbed a number of times near one of the Boston University buildings in the Commonwealth Avenue — Kenmore Square area.

As a result of that, the Commonwealth has procured indictments against each of these three defendants alleging that the defendants are guilty of armed robbery, assault with intent to murder, while armed, and assault and battery by means of a dangerous [534] weapon, and there are nine indictments in all.

I would remind you that I am speaking only of the Commonwealth's allegations. These are not statements of fact. They are statements of what the Commonwealth alleges and as will become apparent to you, the defendants deny all of this.

I would direct you that with respect to these cases, whether or not you are selected to serve upon this jury, that it is imperative that you follow the Court's direction and not talk about this case or the empanelling procedure among yourselves or with any jurors back in the jury pool, if you should return to the pool, or with anybody else in company with you until further order of the Court.

There are good reasons for that order. It is not frivolous, and I am sure you will obey it.

Now, Mr Voke, the Clerk, in a few moments, after one or more of you take your seats in this jury at my left, which is partly empanelled, as you see, will ask three questions.

The first of these reads as follows: If any of you are related to the defendant or to the victim, or if any of you have any interest in this case or have expressed or formed an opinion, or is sensible of any [535] bias or prejudice, please make it known to the Court at this time.

Question No. 2 will read as follows: If there is any serious reason — serious reason — why you cannot serve upon this jury, considering that you will be locked up and living in a hotel away from home for about a week, you should make it known to the Court at this time.

Question No. 3 is, Are you presently, or have you in the past worked for a police department or a district attorney's office, or do you have any relative who is or was engaged in such work?

Now, for your further instruction and information, let me say a few words about each of those prospective questions.

As to Question No. 1, you will recall that in your original instructions on the first day of service this month, and probably on subsequent days, one or more Judges have said to you that one of your primary duties and perhaps your chief duty under your oath, is to return fair and impartial verdicts based upon the [evidence] that you hear, and no other consideration.

Now, with respect to the case before you, there was certain publicity as to the incident when it [536] happened by reason of newspapers, radio, and T.V. publicity. And when considering whether you have anything to bring to the attention of the Court with respect to Question No. 1 as addressed to you by the Clerk, you should examine such exposure, if any, you have had to such publicity.

Now the mere fact that you are exposed to publicity does not disqualify you from sitting on the jury. It is only if such exposure to publicity prevents you from following your oath and your duty to return a fair and impartial verdict upon the evidence, that you are disqualified from the case.

In short, if by reason of anything that you know related to prior publicity, or such, you feel that you could not return a fair and impartial verdict upon the evidence or have serious doubt that you could return a fair and impartial verdict upon the evidence, then it is your duty to make it known to the Court in answer to that first question.

Now, that first question, of course, isn't related only to publicity. That first question is related to your entire duty, to be able in this case with such knowledge as you have at this time, to be able to return a fair and impartial verdict upon the [537] evidence and no other outside circumstances.

So examine your intellect and your conscience from all that you know about the case, and if when the Clerk asks you that first question, you determined in your own mind that you could not return a fair and impartial verdict based upon the evidence, and nothing else, or if you determine in your own mind that you have a doubt as to whether you could return a fair and impartial verdict based upon the evidence in the case, and nothing else, then in that instance, in either of those instances, bring it to the attention of the Court. It is your duty to do so at that time.

Now as to Question No. 2, as to whether you have a serious reason why you should not be locked up, living at the Parker House for about a week in consideration of this case, consider whether there is a serious reason — and the Court expects that no juror would offer anything other than a serious reason why he should not serve under such circumstances — you consider

also that the Court Officers will move quickly to obtain toilet articles and do anything else that is necessary by way of securing automobiles or something of that sort to make sure that nothing other [538] than a smooth transition, as far as your living status is concerned, is accomplished if you are selected to sit.

Now, with respect to the third question, examine your own background and examine those of your immediate relatives, father, son, daughter, mother, sister, brother, your immediate family, to see whether you or any member of your immediate family does or has worked at anytime for a law enforcement agency. If so, bring it to the attention of the Court when the question is asked.

Mr. Voke.

(Jury empanelling continuing.)

JUROR: I have formed an opinion.

THE COURT: Over here.

(Bench conference as follows:)

THE COURT: Let me put the question directly to you, Mr. Doherty. Do you feel that you could in response to your oath return a fair and impartial verdict upon this case, based upon the evidence and no other consideration? JUROR: No, I don't believe I could. I was on a case last night, and it just didn't work out right. I feel as though I cannot return —

[539] THE COURT: You felt, based upon your experience in a case that just concluded —

JUROR: Yes, your Honor.

THE COURT: That your own state of mind is such that you could not bring a fair and impartial verdict, or a fair and impartial mind to the evidence in this case? JUROR: True, your Honor.

THE COURT: Gentlemen, under the circumstances, we have no alternative but to excuse the juror. You may take your seat in the back of the room.

All right, the juror in seat No. 12.

Do you feel in response to your oath that you could return a fair and impartial verdict upon this case? JUROR: No, sir.

THE COURT: Based upon the evidence and nothing else? JUROR: No, sir.

THE COURT: Just as a matter of curiosity, and for the record — no, I think it would be unfair to you to inquire further. You have examined your conscience on this matter very thoroughly, I assume? JUROR: Yes.

[540] THE COURT: You may take your seat in the back of the room, you are excused.

CLERK: Juror?

THE COURT: Mr. McGrath, do you feel that you could return a fair and impartial verdict upon these cases within the terms of your oath as a juror, based upon the evidence and no other consideration? JUROR: No your Honor. The reason —

THE COURT: The answer is no. Have you examined your conscience? JUROR: Yes, I have.

THE COURT: It is a strange wave of conscience flowing through the courtroom this morning.

MR. MULDOON: Your Honor, may I ask that the juror be asked whether or not his reason is based upon pretrial publicity?

THE COURT: I would be glad to do that. Is it based upon pretrial publicity? JUROR: No, it isn't.

THE COURT: Thank you; you are excused. All right, the next man in seat 12.

Mr. Morris, do you feel that you could bring a fair and impartial verdict back in this case based upon your oath and based upon the evidence and no other consideration? [541] JUROR: Yes, but —

THE COURT: Excuse me, let me put it to you again. Do you feel that based upon — that you could return a fair and

impartial verdict in this case based upon the evidence and no other consideration? JUROR: Yes, but I have a heart condition.

THE COURT: You do have a heart condition? JUROR: I had an attack about 7 weeks ago; I would like to be at home.

THE COURT: You had an attack 7 weeks ago? JUROR: Yes.

THE COURT: Gentlemen, I am excusing Mr. Morris for ill health.

MR. OWENS: No objection.

MR. DONNELLY: No objection.

THE COURT: Yes, Mr. Riley? JUROR: Well, I have a mother 86 years old that I have to take care of.

THE COURT: Who are the members of your immediate family? JUROR: Just myself and sister, and me.

THE COURT: Well, is your sister in good health? JUROR: Yes, but she works nights, and I have to see that my mother has her supper and is put to bed [542] every night and washed.

THE COURT: Well, under the circumstances —

MR. OWENS: I have no objection.

MR. DONNELLY: No objection.

THE COURT: Mr. Muldoon?

MR. MULDOON: I object, your Honor.

THE COURT: It places you in an impossible position.

MR. MULDOON: No comment.

THE COURT: It is unfortunate. All right, Mr. Riley, you may take your seat in the back of the room. All right, next juror?

JUROR: I don't believe I could reach a decision. I have heard about the case and talked about it. I don't believe I could honestly —

THE COURT: You feel that in conscience you could not return a fair and impartial verdict? JUROR: No, sir.

THE COURT: Based upon the evidence and no other considerations. Were you a member of that jury that returned late last night? JUROR: Yes.

THE COURT: You may take your seat at the back [543] of the room.

MR. MULDOON: Your Honor, at this time, on behalf of the Commonwealth, I am going to move for a mistrial. I feel that the Commonwealth is unable under the particular jurors that are available, and the fact that obviously three or four of them sat on a case last night, and it appears to be related to some of their reasons for excuses in this case, I feel that the Commonwealth has — I have available 35 challenges.

THE COURT: I appreciate your problem.

MR. MULDOON: Which I am unable to exercise.

THE COURT: If you will let me speak —

MR. MULDOON: I am sorry.

THE COURT: I appreciate your problem. It is a sympathetic one. On the other hand, I would hope that of the remaining jurors seated in the back of the room, we would find one who is, shall we say, morally and intellectually superior to the four people who didn't exactly cover themselves with glory in the last five minutes here as American citizens. I do appreciate your problem though, I believe me, and I am sympathetic to it.

MR. MULDOON: In addition, I feel under the [544] circumstances, or under the particular system adopted —

THE COURT: Mr. Muldoon, would you —

MR. MULDOON: Could I say something?

THE COURT: Let me put it this way. Would you, or would all counsel acquiesce, to the Court on motion of any party revising the number of jurors downward to 14 rather than seeking to find one among those at the rear of the room?

MR. OWENS: May I have just one moment with counsel? THE COURT: Surely.

MR. NEWMAN: I think we have a split.

THE COURT: Of course you gentlemen realize it is entirely discretionary with the Court. All you are entitled to is 12. Mr. Muldoon, what is your attitude?

MR. MULDOON: I am inclined to press my motion for a mistrial rather than to amend the originally agreed number. If unfortunately the suggestion had been perhaps presented before I exercised my challenges, that would be something else, but I have already put myself in a position which I feel was not an exercise of free judgment on my part in the use of my peremptory [545] challenges, and I at this time — if I still had my peremptory challenges and knew it was going to be 14, if this was a few moments ago, I would perhaps have no objection. But I feel I am bound in several directions, being pulled in several directions and unable to exercise the challenges that should be available to me as set up by the Legislature.

I feel also, I want to be clear on the record, that under the system adopted, that the defendants have had three opportunities to accept or challenge every single juror, and I have had but one, and I don't feel that — I clearly except to that method or use of the challenges.

THE COURT: I am not going to change the system of empanelling that has been customary with the Court for probably several generations.

MR. MULDOON: I don't feel that it is the system, your Honor, because the jurors were polled one at a time. I would accept, and each of the defendants would accept or reject at that moment.

THE COURT: Excuse me, are you academically stating that in non-capital cases, it is customary to have a voir dire with one juror at a time? MR. MULDOON: No, I am not saying that.

[546] THE COURT: I didn't think you were.

MR. MULDOON: I don't say that at all.

THE COURT: Let me say that — again, I am sympathetic to the Commonwealth's position in this case. There are peculiarities to the case, and peculiarities of the jury pool that have not worked perfectly from the Commonwealth's interests in this matter, but I am going to declare the empanelling at an end with fourteen jurors.

All jurors in the box have either been subject to challenge by all parties or else all parties have exhausted their challenges, and we will declare the empanelling at an end. We have fourteen, and under the circumstances we will move forward with the opening after a short recess.

Is there anything further to be said at this time?

MR. OWENS: Your Honor, just in behalf of James Williams, I would — you know — most respectfully ask the Court that it was on the motion of the Commonwealth that we have a protracted trial here, and I think it is rather late for Mr. Muldoon now to question the merits of the system.

With respect to the challenges, I had filed [547] a motion for severance which he could have assented to, and he wouldn't have this problem of co-defendants. My position is that since we do have a jury polled here, we initially started out with a protracted trial — now I would ask the Court that we do have a panel before us now, that that panel should be exhausted prior to going forward with 14 jurors.

THE COURT: Let the record show that the control, aside from — let the record show — of course it need not show — it is already obvious in the record that the Commonwealth is the only one left with peremptory challenges at this time. There is no problem. We have 14 jurors. There is no magic in 15, as a number. Fourteen, I think, is sufficient to insure that we will go forward to the end of the trial with at least twelve healthy and active jurors. That, of course, is our main concern. So we will send this jury upstairs for ten minutes, taking the

morning recess a little early, and you gentlemen can collect your thoughts, and we will proceed to try this case.

MR. OWENS: Note my exception, your Honor.

THE COURT: Yes, sure.

EXCEPTION No. 25

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[1306] THE COURT: Mr. Foreman and members of the jury, in order that you have some idea of the procedure we are following this morning, let me say this: we will hear the arguments of Mr. Newman and Mr. Donnelly in succession, and for your convenience, we will take a brief recess.

We will then hear the other two arguments, Mr. Owens, and Mr. Muldoon, and thereafter we will take another brief recess. Then we will return and have the charge before we excuse you for lunch and your deliberations.

Mr. Newman, the jury will hear you.

(Final arguments omitted.)

(Following final arguments, lobby conference recorded as follows:)

THE COURT: On the record, gentlemen. Let me say that, of course we must send photo copies of indictments out rather than the original indictments for obvious reasons. There are all kinds of notes on the originals.

Insofar as two of these defendants are concerned, it was necessary, consistent with the [1307] thoughts of all concerned earlier in the trial, it was necessary to block out the Muslim names or Muslim aliases of two of the defendants. Is there any objection to that?

MR. OWENS: I have no objection.

MR. DONNELLY: No.

THE COURT: I think it is necessary under the circumstances. Not too significant, but certainly worth while doing.

All right then, they are going to the jury under agreement of all counsel, with the indictment names of Roy Daniels, James Williams, and James Ross.

Now, with respect to the assault with intent to murder indictment, I am giving the jury only the alternative verdicts of not guilty or guilty for this reason. There is a companion indictment against each of these men which sounds in assault with a dangerous weapon. Under that companion indictment, I am giving them the three alternative verdicts.

. . . . . .

Defendant's Assignment of Error No. 5.

(5) By denying the Defendant's motion for examination of proposed jurors. Defendant contends that the denial of his request that his counsel be allowed to examine proposed jurors and the denial of his alternative request that the Court ask seven stated questions of proposed jurors to determine possible bias or prejudice made it impossible for Defendant to obtain a trial by a fair and impartial jury.

Exceptions 11-13, 17-19
Transcript pp. 360-361, 419-427, 429-435, 438-439, 450-454, 495-497

Mittimus.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, TO WIT:

To the Sheriff of said County of Suffolk, his Deputies, the Officers of the Court hereinafter named, and the Superintendent of the Massachusetts Correctional Institution, Walpole, in the County of Norfolk. GREETING:

WHEREAS, by the consideration of the Superior Court holden at Boston within and for the County of Suffolk for the transaction of Criminal Business, on the second day of July in the year of our Lord one thousand nine hundred and seventy

James Ross, the younger of that name

now in custody of the Sheriff of said County of Suffolk, convicted of the crime of assault and battery by means of a

dangerous weapon committed at said Boston, was sentenced to be confined in said Massachusetts Correctional Institution, Walpole, for a term of not more than ten years and not less than six years and to stand committed in pursuance of said sentence. This sentence to be served concurrently with a sentence imposed this day by said Court upon said defendant to said Massachusetts Correctional Institution on indictment #48032. The Court in imposing sentence orders that the defendant be deemed to have served one hundred nineteen days of said sentence.

WE, THEREFORE, command you, the said Sheriff, Deputies and Officers of said Court, to remove the said Ross from the Jail in Boston in the said County of Suffolk, to said Massachusetts Correctional Institution, Walpole in the said County of Norfolk; and we command you, the said Superintendent to receive the said Ross and immediately thereon to cause the said Ross to be confined therein for a term of not more than ten years and not less than six years.

And for so doing this shall be your warrant; and you said Sheriff and Officers are to make return of this warrant with your doings thereon to the office of the Clerk of said Superior Court in Boston as soon as may be.

WITNESS, G. JOSEPH TAURO, ESQUIRE, Chief Justice of said Superior Court, at Boston, this second day of July in the year of our Lord one thousand nine hundred and seventy and sealed with the seal of said Court.

JOHN H. VOKE
Assistant Clerk of
said Superior Court.

Mittimus.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, TO WIT:

To the Sheriff of said County of Suffolk, his Deputies, the Officers of the Court hereinafter named, and the Superintendent of the Massachusetts Correctional Institution, Walpole, in the County of Norfolk. GREETING:

WHEREAS, by the consideration of the Superior Court holden at Boston within and for the County of Suffolk for the transaction of Criminal Business, on the second day of July in the year of our Lord one thousand nine hundred and seventy

James Ross, the younger of that name

before the Court by virtue of a writ of habeas corpus, now convicted of the crime of robbery being armed committed at said Boston, was sentenced to be confined in said Massachusetts Correctional Institution, Walpole, for a term of not more than thirty years and not less than eighteen years and to stand committed in pursuance of said sentence. The Court in imposing sentence orders that the defendant be deemed to have served one hundred nineteen days of said sentence.

WE, THEREFORE, command you, the said Sheriff, Deputies and Officers of said Court, to remove the said Ross from before said Court in the said County of Suffolk, to said Massachusetts Correctional Institution, Walpole in the said County of Norfolk; and we command you, the said Superintendent to receive the said Ross and immediately thereon to cause the said Ross to be confined therein for a term of not more than thirty years and not less than eighteen years.

And for so doing this shall be your warrant; and you said Sheriffs and Officers are to make return of this warrant with your doings thereon to the office of the Clerk of said Superior Court in Boston as soon as may be.

WITNESS, G. JOSEPH TAURO, ESQUIRE, Chief Justice of said Superior Court, at Boston, this second day of July in the year of our Lord one thousand nine hundred and seventy and sealed with the seal of said Court.

JOHN H. VOKE
Assistant Clerk of
said Superior Court.

Mittimus.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, TO WIT:

To the Sheriff of said County of Suffolk, his Deputies, the Officers of the Court hereinafter named and the Superintendent of the Massachusetts Correctional Institution, Walpole, in the County of Norfolk. GREETING:

WHEREAS, by the consideration of the Superior Court holden at Boston within and for the County of Suffolk for the transaction of Criminal Business, on the second day of July in the year of our Lord one thousand nine hundred and seventy

James Ross, the younger of that name

now in custody of the Sheriff of said County of Suffolk, convicted of the crime of being armed with a dangerous weapon, did assault Timothy Lehane, with intent to murder him committed at said Boston, was sentenced to be confined

in said Massachusetts Correctional Institution, Walpole, for a term of not more than twenty years and not less than eighteen years and to stand committed in pursuance of said sentence. This sentence to be served concurrently with a sentence imposed this day by said Court upon said defendant to said Massachusetts Correctional Institution on indictment #48032. The Court in imposing sentence order that the defendant be deemed to have served one hundred nineteen days of said sentence.

WE, THEREFORE, command you, the said Sheriff, Deputies and Officers of said Court, to remove the said Ross from the Jail in Boston in the said County of Suffolk, to said Massachusetts Correctional Institution, Walpole, in the said County of Norfolk; and we command you, the said Superintendent to receive the said Ross and immediately thereon to cause the said Ross to be confined therein for a term of not more than twenty years and not less than eighteen years.

And for so doing this shall be your warrant; and you said Sheriffs and Officers are to make return of this warrant with your doings thereon to the office of the Clerk of said Superior Court in Boston as soon as may be.

WITNESS, JOSEPH G. TAURO, ESQUIRE, Chief Justice of said Superior Court, at Boston, this second day of July in the year of our Lord one thousand nine hundred and seventy and sealed with the seal of said Court.

JOHN H. VOKE
Assistant Clerk of
said Superior Court.

Order of Appellate Division.

Present: Forte, Smith and Paquet, JJ.

The appeal of the defendant for a review of sentence(s) to the M.C.I., Walpole, imposed July 2, 1970 on indictment(s)

numbered 48032, 48033 & 48112 by the Superior Court for the County of Suffolk having come before the Justices of the Appellate Division on October 24, 1972, and the defendant having voluntarily refused to appear, it is ORDERED: that the judgment(s) imposing said sentence(s) stand and that said appeal be and is hereby dismissed with prejudice.

By the Appellate Division
Sitting at the District
Court of Western Norfolk

/s/ JAMES B. GIBBONS
Assistant Clerk of the Appellate
Division of the Superior Court

October 24, 1972

ADVANCE SHEETS

OPINIONS OF THE SUPREME JUDICIAL COURT

Published under authority of Chapter 403 of Acts of 1935

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COMMONWEALTH *vs.* JAMES ROSS, JR. (and eight companion cases[1]).

Suffolk. December 6, 1971. — April 27, 1972.

Present: TAURO, C.J., CUTTER, REARDON, QUIRICO, & BRAUCHER, JJ.

Identification. Practice, Criminal, Assistance of counsel, Examination of jurors. *Constitutional Law,* Assistance of counsel, Self incrimination. *Evidence,* Inculpatory communication, Relevancy and materiality. *Search and Seizure. Probable Cause. Jury and Jurors.*

Indictments tried in the Superior Court before *Hennessey,* J.

TAURO, C.J. The defendants Ross, Daniels, and Williams appeal under G. L. c. 278, §§ 33A–33G, from convictions on nine indictments arising out of an armed robbery of Timothy Lehane, a security guard at Boston University. Each defendant was charged with armed robbery, assault with a dangerous weapon, and assault and battery with intent to murder. The principal assignments of error argued on appeal relate to the trial judge's refusal to suppress the in-court identification of the defendant Daniels by the victim Lehane and the in-court identifications of all three defendants by a witness, Howard Lembeck. In addition, the defendant Ross argues that the judge erred in admitting evidence of an inculpatory gesture by him, in admitting certain paper money in possession of the defendant Daniels, and in denying his request that the judge ask certain ques-

[1] Of the companion cases two are against James Ross, Jr., three are against Roy Daniels, Jr., and three are against James Williams.

tions of proposed jurors to determine possible racial prejudice.

From the evidence presented at voir dire and at trial, the following appears: On March 6, 1970, at 4 A.M. a black 1960 Oldsmobile containing three black males pulled up beside the pumps at Silva's Texaco Station, 601 Commonwealth Avenue, Boston. Howard Lembeck, the attendant on duty, conversed with the men, who remained inside the automobile. He sold one of them an inflated plastic rabbit. At one point, he leaned inside the car and passed out cigarettes to each of the men and, at another point, the men asked whether the Boston University radio tower was open, and Lembeck replied, "I don't know." Apart from two brief visits to the station office, Lembeck stood next to the Oldsmobile beside the rear window on the passenger's side. Allegedly, the defendant Ross was seated in front on the driver's side, the defendant Williams in front on the passenger's side, and the defendant Daniels in back on the passenger's side. The area in which the vehicle was parked was illuminated by floodlights.

After fifteen or twenty minutes, Lehane drove into the pump area of the filling station in an unmarked Boston University security automobile. The man identified as Daniels questioned Lembeck about Lehane, and Lembeck told him that Lehane was a security guard at Boston University. This man then got out of the Oldsmobile and, carrying the plastic rabbit, approached Lehane who, in the meantime, had gotten out of his vehicle. In plain view of Lembeck, the man and Lehane conversed for approximately two minutes in which time the man offered to sell Lehane the plastic rabbit. He also asked whether "Eddie" was over at the School of Public Communications and Lehane answered that he would go over and find out. Following the conversation, Lehane left the filling station and drove up Commonwealth Avenue to the School of Public Communications. The man identified as Daniels and his two companions followed in the Oldsmobile and parked two car lengths in front of Lehane's car on Hinsdale Street. A brutal and unprovoked attack ensued in which Lehane

received serious, multiple stab wounds. The man identified as Daniels was the first to attack but the other men later joined in. At one point an assailant said, "Get his gun," and then the victim felt a hand reach into his pocket and take his wallet. The three men then left Lehane bleeding, on the ground. Back at the filling station, five or ten minutes after Lehane and the three men had left, the attendant Lembeck observed the black 1960 Oldsmobile coming down Commonwealth Avenue at a high rate of speed with three black male occupants.

Later the same morning at approximately 6 A.M., two Boston police officers in a patrol car observed a black Oldsmobile turn from Dartmouth Street onto Tremont Street, through a flashing red light, at about fifty miles an hour. The officer driving the patrol car was aware of the assault at Boston University about an hour earlier. After a pursuit on Tremont Street, the police officers stopped the Oldsmobile and took the occupants, four black men, into custody. There was a large pink bunny with visible red stains on the rear deck. At this time a cursory search was made of the men. Later at station 4, while making an inventory of the defendants' possessions, one of the arresting officers removed a wallet, folded in thirds, from the defendant Daniels's outer coat pocket. He slid the wallet across a sloping desk to the booking officer, the fold opened, and out fell a five dollar bill and two ones. Upon observing bloodstains on two of the bills, the police segregated all three bills from the wallet and kept them for further investigation.

Still later in the morning, two police officers interviewed Lembeck at the filling station. Lembeck then went with the officers to the police station, where he made a written statement, and then to the Roxbury District Court, where he observed the defendants Ross and Daniels and a third man in the "lockup" area and later at the arraignment. On voir dire, Lembeck testified that, without any direction from police, he scrutinized about a dozen men in the "lockup" area, and that privately in his own mind he picked out Ross and Daniels. At trial, he was permitted to testify that the defendant Ross gestured to him from

within the wire enclosure by raising a finger to his lips suggesting silence. Also on voir dire, he testified that he identified Ross and Daniels for the police after watching the arraignment but that he did not identify the third man arraigned with them. The defendant Williams, the fourth man in the car, was not present at the arraignment.

About a week later, Lembeck identified the defendant Williams after viewing a group of fourteen police photographs of black males the same age as the defendants. These included pictures of Ross, Daniels, and the third man at the arraignment. Lembeck knew at this time that the police held a fourth suspect who had not been present in the District Court. Lembeck first viewed the pictures at the filling station and made his identification of Williams on the second run through the photographs. He also identified Ross and Daniels. He was then taken to the police station where he again looked at the photographs and identified Williams. Approximately three months later, there was a third showing of the photographs, this time at the district attorney's office. On the same day, Lehane also visited the district attorney's office and viewed the photographs separately. He identified only the defendant Daniels.

After the voir dire hearing the judge below denied the motions of all the defendants with respect to in-court identification testimony but did allow the defendants' motions in so far as they might be "construed as motions to suppress the Commonwealth's offering of the photographic identification procedures by the witnesses Lembeck and Lehane, and the Roxbury courthouse identification procedures by the witness Lembeck." Later at trial, however, the judge limited his last ruling to the extent that he allowed Lembeck to give testimony concerning the attempt by the defendant Ross to communicate with Lembeck by gesture at the Roxbury District Court.

1. Each defendant contends that the judge erred in permitting Lembeck to identify him at trial. The defendants Ross and Daniels maintain, principally in reliance upon *United States* v. *Wade*, 388 U. S. 218, *Gilbert* v. *California*,

388 U. S. 263, and *Stovall* v. *Denno*, 388 U. S. 293, that Lembeck's in-court identifications were the fruit of impermissibly suggestive pre-trial lineups, conducted in the absence of counsel, in violation of the right of the defendants to counsel, and to a fair trial. In addition, the defendant Ross contends on the basis of *Simmons* v. *United States*, 390 U. S. 377, as does the defendant Williams, that Lembeck's in-court identifications were tainted by prior photographic identification procedures.

The judge after making detailed subsidiary findings on all the issues of identification concluded as follows: "The circumstances surrounding the identification procedures by Mr. Lembeck at the Roxbury courthouse have not been shown in enough detail before me to demonstrate an illegality in those procedures. Nor has any illegality been demonstrated re the photograph[ic] identifications made by the witness . . . Lembeck . . . . However, even assuming the illegality of these procedures, I find that . . . the in-court identifications of all three defendants by the witness Lembeck are independent of the in-custody procedures and are therefore valid."

The judge ruled that the Commonwealth had satisfied its burden of proving the independence of the in-court identifications by "clear and convincing evidence" as *United States* v. *Wade*, *supra*, at 224, requires. There was an ample evidentiary basis to support the judge's conclusion.

We deal first with the pre-trial identifications of Ross and Daniels. While there may have been an element of suggestiveness in Lembeck's confrontations with the defendants at the Roxbury court house, we believe that the judge correctly emphasized Lembeck's prior opportunity to observe the men at the filling station earlier the same morning. The pump area of the filling station was well lighted, and Lembeck could see the features of the three occupants clearly. Although he talked mainly with Daniels, he had some conversation with all three men, he was in their presence for approximately twenty minutes, and he leaned inside the automobile at one point and gave each man a cigarette. Later, he saw Daniels outside the automobile

as he conversed with Lehane. The atmosphere during Lembeck's prolonged encounter with the trio was not casual, but gave Lembeck reason to feel uneasy and thus to be more conscious and aware of the men. The defendants argue that Lembeck did not describe the men in detail in either his oral or his written statement to the police; however, it is undisputed that the police did not ask for details and, in this circumstance, we attach no particular significance to the lack of a detailed description in Lembeck's statements.

In cases where there has been a suggestive in-custody identification, the determination whether to permit an identification at trial requires a consideration of a variety of factors. *United States* v. *Wade*, *supra*, at 241.[1] See *Gilbert* v. *California*, 388 U. S. 263, 272–274; *Commonwealth* v. *Cooper*, 356 Mass. 74, 84; *Commonwealth* v. *Wilson*, Mass. , ;[a] *Commonwealth* v. *Mendes*, Mass. , .[b] The factors applied, however, depend upon their context, and every factor is not necessarily entitled to equal weight. See *United States* v. *Wade*, 388 U. S. 218, 241–242, n. 33; *Stovall* v. *Denno*, 388 U. S. 293, 302. If greater weight is given to any single factor, "[t]he extent of the witness' opportunity to observe the defendant at the time of the crime . . . seems the most important. Clearly the firmer the contemporaneous impression, the less is the witness subject to be influenced by subsequent events." *Allen* v. *Moore*, 453 F. 2d 970, 975 (1st Cir.). *Commonwealth* v. *Mendes*, *supra*.[b] In the circumstances of the instant case, we are satisfied that Lembeck had ample opportunity to observe all three men at the filling station and that, as a result of his observations, he received a firm contemporaneous impression of each of them. We have considered the evidence bearing upon Lembeck's confronta-

[1] The six factors enumerated in *United States* v. *Wade*, 388 U. S. 218, 241, were: "(1) The extent of the witness' opportunity to observe the defendant at the time of the crime; prior errors, if any, (2) in description, (3) in identifying another person or (4) in failing to identify the defendant; (5) the receipt of other suggestions, and (6) the lapse of time between the crime and the identification." *Allen* v. *Moore*, 453 F. 2d 970, 975 (1st Cir.).

[a] Mass. Adv. Sh. (1971) 1731, 1734–1735.

[b] Mass. Adv. Sh. (1972) 681, 684.

tions with Ross and Daniels at the Roxbury court house, and we conclude the judge correctly ruled that these confrontations were not so suggestive as to taint Lembeck's initial impression of the men. *Cooper* v. *Picard*, 428 F. 2d 1351, 1354 (1st Cir.), *S. C.* 316 F. Supp. 856, 859 (D. Mass.). See *Commonwealth* v. *McGrath*, Mass. , – .[c] Compare *Foster* v. *California*, 394 U. S. 440, 442–443. For these reasons, we conclude there was sufficient basis for the judge's determination that the in-court identifications of Ross and Daniels had an origin independent of Lembeck's pre-trial confrontations with the defendants at the court house. See *Commonwealth* v. *Robinson*, 355 Mass. 620, 621–622; *Commonwealth* v. *Cooper*, *supra*, at 84–85; *Commonwealth* v. *Cefalo*, 357 Mass. 255, 257–258;[d] *Commonwealth* v. *Balukonis*, 357 Mass. 721, 725;[e] *Commonwealth* v. *Wilson*, Mass. , – ;[f] *Commonwealth* v. *Tempesta*, Mass. , .[g] Compare *Commonwealth* v. *Kazonis*, 356 Mass. 649, 653.

We turn next to the claims of the defendants Ross and Williams concerning photographic identification procedures followed by the police. Both defendants point to the judge's finding that, of the photographs shown to Lembeck, "[o]nly the pictures of the three defendants . . . contained on the reverse side the names and other information concerning the subjects of the photographs." However, there was no finding, nor was there any evidence on which a finding could be based, that the witness saw the written material, much less was influenced by it. Furthermore, apart from this writing, the photographs were all of the same type and each showed a black male of approximately the same age as the defendants.

The defendant Williams also objects to the manner in which the photographs were shown. He notes that, when

[c] Mass. Adv. Sh. (1972) 591, 596–597.

[d] Mass. Adv. Sh. (1970) 507, 509.

[e] Mass. Adv. Sh. (1970) 1043, 1046–1047.

[f] Mass. Adv. Sh. (1971) 1731, 1734–1735.

[g] Mass. Adv. Sh. (1972) 335, 338–339.

Lembeck viewed the photographs at the police station, an officer pointed to the picture of Williams and inquired about him by name, and that the witness then made a positive identification. While we might attach more significance to this episode if it had been Lembeck's first identification of Williams (see *United States* v. *Trivette*, 284 F. Supp. 720, 723 [D. D. C.]), we see little, if any, significance in the episode since the witness had already identified Williams on a prior showing, an hour earlier at the filling station, without any suggestion whatever from the police.

We agree with the judge that police procedures in connection with the photographic identifications were not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U. S. 377, 384. *Commonwealth* v. *Wilson*, 357 Mass. 49, 54.[h] In any event, even if we were to assume that they were, we are satisfied that Lembeck's prior observations of Ross and Williams on the morning of the crime were "an independent source" for his in-court identifications. *United States* v. *Wade*, 388 U. S. 218, 242. See *Commonwealth* v. *Wilson*, 357 Mass. 49, 55;[i] *Commonwealth* v. *McGrath*, Mass. , .[j]

We recognize that the objections of the defendant Williams to some extent relate to the absence of counsel at the various showings of photographs to Lembeck. As we understand the *Simmons* decision, however, it was expressly limited to due process considerations. No claim was made under the Sixth Amendment. *Simmons* v. *United States*, 390 U. S. 377, 383. The case of *Cox* v. *State*, 219 So. 2d 762 (Ct. App. Fla.), to which Williams directs our attention, involved a video taped lineup and is plainly distinguishable from the instant case on the facts. Nor do we believe that the showing of standard police identification photographs constitutes a State compelled "confrontation" or exhibition within *United States* v. *Wade*, 388 U. S. 218, 228. Cf. *Commonwealth* v. *Geraway*, 355 Mass. 433, 438–439. In this regard, we agree with the following statement from *United States* v. *Bennett*, 409 F. 2d 888, 899–900 (2d Cir.), cert. den. sub nom. *Haywood* v. *United States*, 396 U. S. 852, reh. den. 396 U. S. 949: "[T]o require that defense counsel be allowed or appointed to attend out-of-court proceedings where the defendant . . . is not present would press the Sixth Amendment beyond any previous boundary. None of the classical analyses of the assistance to be given by counsel . . . [citations omitted] suggests that counsel must be present when the prosecution is interrogating witnesses in the defendant's absence even when . . the defendant is under arrest; counsel is rather to be provided to prevent the defendant himself from falling into traps devised by a lawyer on the other side and to see to it that all available defenses are proferred. Many other aspects of the prosecution's interviews with a victim or a witness to a crime afford just as much opportunity for undue suggestion as the display of photographs; so, too, do the defense's interviews, notably with alibi witnesses. . . . [I]n [the] *Wade* [case] itself, the Court listed as one of the ways the prosecution might attempt to show that a witness' identification of defendant at trial was not the fruit of a lineup held in the absence of counsel a showing of 'the identification by picture of the defendant prior to the lineup,' 388 U. S. [218] at 241 . . ., which clearly implies that such identifications are permissible even when defendant's counsel is not present."[1] See *United States* v.

[h] Mass. Adv. Sh. (1970) 235, 239.

[i] Mass. Adv. Sh. (1970) 235, 239.

[j] Mass. Adv. Sh. (1972) 591, 597.

[1] The majority of circuits of the United States Court of Appeals follow the approach of the Second Circuit in the *Bennett* case. See *United States* v. *Collins*, 416 F. 2d 696, 699–700 (4th Cir.), cert. den. sub nom. *Collins* v. *United States*, 396 U. S. 1025; *United States* v. *Ballard*, 423 F. 2d 127, 130–131 (5th Cir.); *United States* v. *Serio*, 440 F. 2d 827, 829–830 (6th Cir.), cert. den. sub nom. *Serio* v. *United States*, 404 U. S. 838; *United States* v. *Robinson*, 406 F. 2d 64, 67 (7th Cir.), cert. den. sub nom. *Robinson* v. *United States*, 395 U. S. 926; *United States* v. *Long*, 449 F. 2d 288, 301–302 (8th Cir.); *Allen* v. *Rhay*, 431 F. 2d 1160, 1166–1167 (9th Cir.), cert. den. 404 U. S. 834; *United States* v. *Edwards*, 433 F. 2d 357, 358 (9th Cir.); *United States* v. *Roustio*, 435 F. 2d 923, 924 (9th Cir.); *United States* v. *Williams*, 436 F. 2d 1166, 1169 (9th Cir.), cert. den. sub nom. *Williams* v. *United States*, 402 U. S. 912; *United States* v. *Fowler*, 439 F. 2d 133, 134 (9th Cir.); *McGee* v. *United States*, 402 F. 2d 434, 436 (10th Cir.), cert. den. 394 U. S. 908; *Rech* v. *United States*, 410 F. 2d 1131, 1132 (10th Cir.), cert. den. 396 U. S. 970; *United States* v. *Von Roeder*, 435 F. 2d 1004, 1010 (10th Cir.). But see *United States* v. *Zeiler*, 427 F. 2d 1305, 1307 (3d Cir.); *United States* v. *Ash*, F. 2d , (D. C. Cir.) (en banc, 5–4) (10 Cr. L. Rep. 2408). Decisions in ten States

Roth, 430 F. 2d 1137, 1140 (2d Cir.) (following the *Bennett* decision), cert. den. sub nom. *Roth* v. *United States*, 400 U. S. 1021.

2. Nor is there merit in the defendant Daniels's argument that the judge erred in permitting the victim Lehane to identify him at trial. He raises objections to police photographic identification procedures under *Simmons* v. *United States*, 390 U. S. 377, which are similar in nature to those of the defendant Williams just considered. Lehane spoke with the man he identified as Daniels, face to face at a distance of two feet, for two to three minutes in a well lighted area of the filling station. The conversation (first about the inflated plastic rabbit and later about "Eddie" at the School of Public Communications) was such to arouse Lehane's suspicions and to cause him to scrutinize the man's appearance. This man was Lehane's principal assailant. About three months later at the district attorney's office, Lehane viewed the same set of photographs as the witness Lembeck had seen earlier. There was, as we have stated, nothing suggestive about these photographs apart from some writing on the reverse side of four pictures in the set.[4] At voir dire, Lehane testified that he viewed the photographs face up, and only after picking out Daniels, did he notice the writing on the back of some of the pictures. No police were present during the viewing, and although Lehane knew the set contained pictures of all his assailants, he declined to identify any but the photographs of Daniels. Had the writings influenced him, a different result might ensue. While it is true he had seen a newspaper photograph showing

accord with the *Bennett* case. *People* v. *Lawrence*, 4 Cal. 3d 273. *Reed* v. *State*, 281 Atl. 2d 142, 145–146 (Del.). *Staten* v. *State*, 248 So. 2d 697 (Ct. App. Fla.). *People* v. *Martin*, 47 Ill. 2d 331, 336, cert. den. sub nom. *Martin* v. *Illinois*, 403 U. S. 921. *Smith & Samuels* v. *State*, 6 Md. App. 59, 64. *Crenshaw* v. *State*, 13 Md. App. 361, 365–370. *Stevenson* v. *State*, 244 So. 2d 30, 33 (Miss.). *State* v. *Brookins*, 468 S. W. 2d 42, 47 (Mo.). *State* v. *Accor*, 277 N. C. 65, 80–81. *State* v. *Searcy*, 4 Wash. App. 860, 861–864. *Kain* v. *State*, 48 Wis. 2d 212, 218–219. Decisions in two States are contra. *Thompson* v. *State*, 85 Nev. 134, 137–138. *Commonwealth* v. *Whiting*, 439 Pa. 205, 209, cert. den. sub nom. *Pennsylvania* v. *Whiting*, 400 U. S. 919.

[4] The photographs of the fourth man arrested with the defendants on the morning of the crime, as well as those of the defendants, bore the name of the subject and other data on its reverse side.

Daniels and the man arraigned with both Ross and Daniels, significantly he picked out only Daniels's picture among those he viewed at the district attorney's office.

In these circumstances, the judge was correct in concluding that there was nothing in the photographic identification procedures sufficient "to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U. S. 377, 384. Further, regardless of any possible suggestiveness in the photographic viewing,[5] we conclude that the observations of Lehane on the morning of the crime fixed in his mind the features of his principal assailant and provided at trial "an independent source" for his identification of Daniels. *United States* v. *Wade*, 388 U. S. 218, 242. See *Commonwealth* v. *Wilson*, 357 Mass. 49, 55;[*] *Commonwealth* v. *McGrath*, Mass. , .

3. We come next to the argument by the defendant Ross that there was error in the admission of testimony by Lembeck that he observed the defendant make an inculpatory gesture while at the Roxbury court house. Ross contends that the evidence of the inculpatory gesture was the direct result of an illegal pre-trial confrontation and was therefore inadmissible under *Gilbert* v. *California*, 388 U. S. 263, 272–273. We do not agree.

It is undisputed that police officers brought Lembeck to the court room at the Roxbury District Court between nine and ten o'clock on the morning of the crime. There were approximately twelve black males, including the defendants Ross and Daniels, in a wire enclosure visible from the court room. Lembeck testified that, without encouragement from police, he "looked around on . . . [his] own," and that when no police were present, the defendant Ross placed the forefinger of his right hand vertically to his lips while at the same time making a "peace sign" (first and second

[5] To the extent, however, that the defendant Daniels relies on the Sixth Amendment, we reject his claim without qualification. For the reasons stated, *supra*, we are of the opinion that the right to have counsel present does not extend to showings of standard police identification photographs.

[*] Mass. Adv. Sh. (1970) 235, 239.

Mass. Adv. Sh. (1972) 591, 597.

fingers forming a "V") with his left hand. According to Lembeck, the police at no time pointed to, nor did they ask him to identify, any of the men in the enclosure. He picked out the defendants Ross and Daniels in his own mind, but he did not tell the police until later.

The right to have counsel present attaches at every "critical stage" of a criminal case where the State exhibits the defendant to the victim of the crime or to potential witnesses against him. *Commonwealth* v. *Cooper*, 356 Mass. 74, 80–83. *Commonwealth* v. *Guillory*, 356 Mass. 591, 592–593. *Commonwealth* v. *Wilson*, 357 Mass. 49, 55–56.[m] See *United States* v. *Wade*, 388 U. S. 218, 236–237; *Gilbert* v. *California*, *supra*, at 272. See also *Simmons* v. *United States*, 390 U. S. 377, 382–383; *Foster* v. *California*, 394 U. S. 440, 442; *Coleman* v. *Alabama*, 399 U. S. 1, 7. The defendant Ross makes much of the fact that the police brought the witness to the court room in order to view the arraignments and, if possible, to identify the suspects. However, even if we agreed that this factor sufficiently indicates a State compelled confrontation, we perceive no constitutional error in the admission of Lembeck's testimony concerning the defendant's gesture to him. While pre-indictment lineup may be a "critical stage" within the meaning of the *Wade* case (see *Commonwealth* v. *Cooper*, *supra*; *Mason* v. *United States*, 414 F. 2d 1176, 1178–1181 [D. C. Cir.]), we do not believe that lack of counsel is determinative in the present circumstances. The purpose of the *Wade* case, as the defendant Ross himself states, is to provide the accused, through the presence of counsel, with an adequate basis at trial to recount any unfairness in pre-trial police identification procedures and to enable an informed cross-examination of identification witnesses. *United States* v. *Wade*, *supra*, at 232. It is difficult, however, to see the relevance of this protection in the present situation where, prior to arraignment, the defendant Ross signalled the witness from the detention pen. The gesture was a voluntary act and in no sense the result of police exploitation. Thus,

[m] Mass. Adv. Sh. (1970) 235, 239–240.

even assuming arguendo the illegality of the witness's observation of the lockup, we are nonetheless satisfied that evidence of the inculpatory gesture came "by means sufficiently distinguishable to be purged of the primary taint" of the lockup identification. *Wong Sun* v. *United States*, 371 U. S. 471, 488. See *Gilbert* v. *California*, *supra*, at 272–273.

Furthermore, we believe the Supreme Court never intended that the *Wade* decision should protect a criminal defendant from an inculpatory communication, whether by word or by gesture, if the communication is voluntary. The prohibition against pre-trial identification without notice and without counsel depends on the Sixth Amendment and not on the Fifth Amendment. In *United States* v. *Wade*, *supra*, at 222, the court said: "We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have." See *Commonwealth* v. *Cooper*, 356 Mass. 74, 82. If the defendant's gesture created a "critical" situation for him, responsibility rests with the defendant and not with the Commonwealth. In the absence of this voluntary gesture on the defendant's part, it is clear that the judge would have suppressed Lembeck's identification of the defendant in the detention area, in its entirety, just as he suppressed the later identification at his arraignment. In the circumstances, the defendant cannot now complain that his own voluntary conduct deprived him of his constitutional rights. Nothing was done or said to the defendant which compelled his act of self-incrimination. In any event, even if the defendant's lawyer had been present in the court room, we fail to see what protection his mere presence would have afforded the defendant. "No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented." *Schmerber* v. *California*, 384 U. S. 757, 766. This is the logical rationale unless we require that counsel must be with a defendant at all times

and places (including the "dock") so that he may advise him not to incriminate himself by gesture to those who may be witnesses against him. We do not believe the Fifth Amendment protection against self-incrimination can be carried to such an extreme. See *Miranda* v. *Arizona*, 384 U. S. 436, 474.

4. The defendant Ross contends that the judge erred in admitting in evidence against all the defendants certain paper money, covered with bloodstains, which the police took from the defendant Daniels while making an inventory of his possessions at the police station. Ross argues that admission of the money was error because it was the fruit of an illegal search and seizure and, also, because it was alternatively irrelevant or prejudicial in the circumstances of this case.

We consider the defendant's nonconstitutional ground first. "The relevancy of . . . [evidence] depends upon the question, whether it has a rational tendency to prove the issues made by the pleadings or other incidental material issues developed in the course of the trial." *Commonwealth* v. *Durkin*, 257 Mass. 426, 427–428. The fact that there was no testimony as to the type of the blood on the paper money goes to the weight and not to the admissibility of the evidence. The victim Lehane testified that the defendant Daniels and two other black men had stabbed and robbed him, that he had bled profusely, and that a five dollar bill was among the property taken from him. Also, there was testimony that the paper money was found not within the compartment of the defendant Daniels's wallet but rather inserted loosely inside the fold. Further, the testimony of the witness Lembeck placed the defendants Ross and Williams as well as the defendant Daniels at the scene of the crime. We conclude, therefore, that the paper money had probative value because, together with other evidence, it tended to establish the fact of robbery and to constitute a link between all three defendants and the crime. See *Commonwealth* v. *Abbott*, 130 Mass. 472, 473; *Commonwealth* v. *Durkin*, *supra*, at 428; *Commonwealth* v. *Norton*, 339 Mass. 592, 594; *Commonwealth* v. *Palladino*, 346 Mass.

720, 726; *Commonwealth* v. *White*, 353 Mass. 409, 419. There is no merit to the contention by the defendant Ross that the blood tainted paper money was so inflammatory as to be inadmissible. See *Commonwealth* v. *Stirling*, 351 Mass. 68, 71–72.

Inasmuch as the Commonwealth does not contest Ross's standing, we proceed to the merits of his claim of constitutional error with reference to the paper money. In denying his motion to suppress made under *Mapp* v. *Ohio*, 367 U. S. 643, the judge ruled as follows: "[t]he procedure which gave rise to the seizure . . . [of the paper money] was not a search within the Constitutional prohibitions raised by this motion, but instead was a mere inventory of the suspect's effects within the unvarying police procedures, for the purpose of protecting the valuables of the suspects and removing from them any property which could be instruments for suicide or self-injury by prisoners."[8] The judge made subsidiary findings, fully supported by the evidence, which may be summarized as follows: After arresting the defendants Ross, Daniels, and Williams and a fourth man, the police took the suspects to the police station for booking. There, as a part of normal booking procedures, an inventory was made of their possessions. The paper money later sought to be suppressed became visible simultaneously to two officers when one officer slid Daniels's wallet across a sloping booking desk to the other officer and the fold in the wallet opened and three loose bills emerged from the fold. The officers seized the bills when they observed what appeared to be bloodstains on two of them. At this time, they were aware that there had been an armed robbery, although they did not know the amount of money allegedly taken from the victim. There was no error.

[8] The judge also made a second ruling that "even if the procedure at the police station were construed to be a search within the Constitutional prohibitions raised by the motion, the events at the police station constituted a reasonable and lawful continuation of the hasty and permissible search of the suspects which was conducted at the time and place of the arrests and which was temporarily suspended for good and necessary reasons of security, and was then continued at the police station after a lapse of only about seven minutes." In view of our holding, *post*, we find it unnecessary to review this second ruling.

"It is well established that under certain circumstances the police may seize evidence in plain view without a warrant." *Coolidge* v. *New Hampshire*, 403 U. S. 443, 465. These circumstances include a requirement that discovery of the evidence be inadvertent and incident to legitimate police activity. *Id.* at 465–471. See *Commonwealth* v. *Haefeli*, Mass. , – ;[8] *Harris* v. *United States*, 390 U. S. 234, 236. There must, in addition, be "a nexus . . . between the item to be seized and criminal behavior." *Warden* v. *Hayden*, 387 U. S. 294, 307. In the instant case, as the defendant Ross concedes, there is no question that the pre-incarceration inventory of possessions was a legitimate police function. On the evidence, an ultimate finding was warranted that the paper money seized came into plain view through inadvertence and during routine, legitimate police work. See *Westover* v. *United States*, 394 F. 2d 164 (9th Cir.). Compare *Brett* v. *United States*, 412 F. 2d 401, 405–406 (5th Cir.); *United States* v. *Jones*, 317 F. Supp. 856, 858 (E. D. Tenn.).[7] Finally, the bloodstains on two of the bills, and the suspicious location of these bills outside the compartment of the wallet, provided sufficient nexus between the paper money and the armed robbery to provide probable cause for the seizure. See *Commonwealth* v. *Haefeli*, *supra*, at – .[9] For these reasons, we cannot say that it was improper in the circumstances of this case for the police to seize the paper money without first obtaining a search warrant.

5. The defendant Ross asserts that the judge's failure to ask the veniremen specific questions drawn by the defendant on the subject of racial prejudice deprived him of the right to an impartial jury. We said in *Commonwealth* v. *Nassar*,

[8] Mass. Adv. Sh. (1972) 423, 432–433.

[7] Furthermore, there was no evidence here, as there was in the *Jones* case (at 857), that police went through the compartments of the suspect's wallet. Even if this had been the case, however, it would have been open for the Commonwealth to show that it was necessary to count the money in the suspect's wallet in order to give the suspect an accurate receipt and thereby to ensure the safety of his valuables. This justification was apparently not considered in the *Jones* case. See p. 858.

[9] Mass. Adv. Sh. (1972) at 433–434.

354 Mass. 249, 253–254; "In accordance . . . with our long standing practice, inquiry of prospective jurors was only by the judge. A trial judge is required only to ask those questions prescribed by statute or court decision. Other questions are in his discretion. . . . [citations omitted] There is ample power in this court to review whether a trial judge has committed any abuse of discretion in refusing to put additional questions, or otherwise to test members of the venire for bias or interest." Upon his probing the subjects required by law (see G. L. c. 234, § 28), he was satisfied that the jurors could render a fair and impartial verdict. There was no abuse of discretion, let alone any constitutional error.

Judgments affirmed.

Mary C. Kingsley (*Reuben Goodman* with her) for Roy Daniels, Jr., & another.

Michael G. West for James Ross, Jr.

Gerald F. Muldoon, Assistant District Attorney, for the Commonwealth.

Order of United States Supreme Court Granting Certiorari and Remanding to Supreme Judicial Court.

Certiorari Granted — Vacated and Remanded

No. 72-5119. Ross v. Massachusetts. Sup. Jud. Ct. Mass. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Ham* v. *South Carolina*, 409 U.S. 524 (1973). Reported below: Mass. , 282 N.E. 2d 70.

Order for Rehearing of Supreme Judicial Court.

In accordance with the order of the United States Supreme Court dated January 22, 1973, it is hereby ordered that the above entitled case is set down for rehearing solely on the limited issue of the jury selection in light of Ham v. South Carolina. The case shall be set down on the April list and briefs shall be filed by both parties on or before March 16, 1973.

By the court,

February 9, 1973. FREDERICK J. QUINLAN
Clerk

ADVANCE SHEETS

OPINIONS OF THE SUPREME JUDICIAL COURT

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COMMONWEALTH *vs.* JAMES ROSS, JR.

Suffolk. April 2, 1973. — May 29, 1973.

Present: TAURO, C.J., REARDON, QUIRICO, KAPLAN, & WILKINS, JJ.

Practice, Criminal, Examination of jurors, Fair trial. *Constitutional Law,* Due process of law.

Rehearing by the Supreme Judicial Court pursuant to an order of the Supreme Court of the United States.

TAURO, C.J. This case is here pursuant to an order entered by the United States Supreme Court[1] granting the defendant's petition for certiorari, vacating the judgment affirming his conviction (*Commonwealth* vs. *Ross,* Mass.)[a] and remanding the case to us for further consideration in the light of *Ham* v. *South Carolina,* U. S. .[b] Thus, the only issue we must decide is whether the *Ham* decision requires that the defendant's conviction should be reversed on the ground that the trial judge refused to ask the veniremen whether they were racially prejudiced.

In the *Ham* case, the defendant's conviction for possession of marihuana had been affirmed by the South Carolina Supreme Court. The young black defendant had lived most of his life in Florence County, South Carolina, and was well

[1] Ross *vs.* Massachusetts, No. 72-5119, U. S. ([January 23, 1973] 41 U. S. L. Week 3408).

[a] Mass. Adv. Sh. (1972) 873.

[b] 93 Supr. Ct. Reporter 848.

known locally for his civil rights activities. He had never previously been convicted of a crime and his basic defence was that the law enforcement officers were "out to get him" because of his civil rights work. The posture of the case thus placed great emphasis on the issue of the credibility of the defendant in light of his reputation as opposed to that of the credibility of the police.

Prior to trial, Ham's counsel requested the judge to ask the prospective jurors four questions, two of which[2] sought to discover any possible racial prejudice. The judge put three general questions to the prospective jurors concerning possible bias, prejudice and partiality, as required by the State statutes,[3] but declined to ask the questions requested by the defendant.

The Supreme Court of the United States reversed Ham's conviction holding that "the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice." U. S. at .[c] Although the court's opinion stated that "the trial judge was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by . . . [the defendant]," the court decided that once the State had "created . . . [a] statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the . . . [the defendant] be permitted to have

[2] These two questions were: "1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race? 2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'?" U. S. , fn. 2 (93 Supr. Ct. Reporter 849, fn. 2).

[3] S. C. Code § 38-202 (1962). The questions were, in substance, the following: "1. Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham? 2. Are you conscious of any bias or prejudice for or against him? 3. Can you give the State and the defendant a fair and impartial trial?" U. S. , fn. 3 (93 Supr. Ct. Reporter 850, fn. 3).

[c] 93 Supr. Ct. Reporter at 850.

the jurors interrogated on the issue of racial bias." U. S. at .[d]

The defendant Ross was convicted in the Superior Court for armed robbery, assault by means of a dangerous weapon with intent to murder, and assault and battery by means of a dangerous weapon, and was sentenced to prison in the Correctional Institution at Walpole to serve three lengthy concurrent terms.

The judge denied the defendant's request to ask the prospective jurors a specific question designed to elicit possible race prejudice.[4] The three lawyers representing the defendant and the two codefendants who were tried with him[5] were concerned about the veniremen's possible prejudice in

[d] 93 Supr. Ct. Reporter at 850.

[4] The defendant requested the judge to ask the veniremen seven questions. Only one of these questions is presently before us as touching upon racial prejudice: "5. Are there any of you who believe that a white person is more likely to be telling the truth than a black person?" The defendant was tried with two other codefendants named Daniels and Williams, both of whom submitted similar questions which were also rejected by the judge. After Ross's conviction had been affirmed by this court, he filed a petition for writ of certiorari to the United States Supreme Court stating that "each defense counsel submitted motions to the judge which proposed questions to be asked to the jurors concerning the issue of racial prejudice." There was then set forth a list of questions headed by the defendant's question numbered 5, and followed by questions numbered 3, 4, 6–10 submitted by the defendant Daniels and questions numbered 10–19 submitted by the defendant Williams. Ross's brief on rehearing now refers to his own question 5, Daniels's questions 3–16 and Williams's questions 10–19. The Commonwealth properly argues that Ross cannot base assignment of error on the judge's failure to ask the questions submitted by Daniels and Williams because Ross never, by motion or otherwise, adopted those questions as his own. Nevertheless, we think that Ross's own question numbered 5 is sufficient to raise the issue of the judge's failure to ask the veniremen a question (or questions) specifically designed to uncover possible racial prejudice.

In his petition for certiorari to the Supreme Court, Ross insists that the facts in the *Ham* case "exhibit considerable similarity with the case at bar." Actually, the only similarity is that Ham and the defendant Ross are black. The petition for certiorari carefully avoids the additional facts in the *Ham* case (that Ham was well known for his civil rights activities and that he claimed that the police were "out to get him" because of his activities) which are nonexistent in the instant case. Conceivably, the Supreme Court may have considered similar circumstances to have existed in the *Ross* case in view of the allegations in the petition. Ross, in his petition, carefully excluded the judge's comments, remarks and questions addressed to the prospective jurors. For all that appears in the petition, the judge merely put the statutory questions to the jury—and no more.

[5] The defendant Ross was represented by Mr. Newman, the defendant Williams was represented by Mr. Owens and the defendant Daniels was represented by Mr. Donnelly.

two specific areas: (1) possible race prejudice because the defendants were black and (2) possible lack of impartiality because the victim was a Boston University security guard or "quasi policeman." The judge recognized both these concerns as problems. He agreed to ask the veniremen whether they had ever done police work or whether they had any relatives in such work.[6] It is not argued that such a question failed to protect the defendants from possible bias on this matter, and this aspect of possible lack of impartiality is not before us.

Although the judge declined to ask the veniremen whether they were prejudiced against black people, he decided, "in the interest of good sense," not to mention the defendants' Muslim names appearing on the indictments, but only to refer to them as Ross, Daniels and Williams. The judge carefully weighed the likelihood of discovering bias by means of questions concerning race prejudice and came to the conclusion that it would be most unusual for such questions to reveal any such prejudice.[7] He explained to the veniremen with clarity that they must let the court

[6] Question: "Are you presently, or have you in the past worked for a police department or a District Attorney's office, or do you have any relative or relatives who is or was engaged in such work?"

[7] The colloquy between the judge and the defence counsel on this matter was as follows:

THE JUDGE: "All right. I am going to approach it, as I have said, with all due respect to the problems, and they are important problems which you gentlemen have raised with these several questions which you have asked the Court to put in addition to the usual statutory inquiry, and without going into the details as to my reasons, I feel that no purpose would be accomplished by asking such questions in this instance.

"There are a number of reasons why I take that position, but they are sound reasons, and the reason I asked you in is that I thought from something Mr. Donnelly said, he might have wanted on the record something which was peculiar to this case, or peculiar to the circumstances which we are operating under here which perhaps he didn't want to say in open court.

"Is there anything peculiar about it, Mr. Donnelly?"

COUNSEL FOR THE DEFENDANT DANIELS: "No, just the fact that the victim is white, and the defendants are black."

THE JUDGE: "This, unfortunately, is a problem with us, and all we can hope and pray for is that the jurors and all of them take their oaths seriously and understand the spirit of their oath and understand the spirit of what the Court says to them—this Judge anyway—and I am sure all Judges of this Court—would take the time to impress upon them before, during,

know if for any reason they could not try the case impartially, without bias or prejudice or if they had already

and after the trial, and before their verdict, that their oath means just what it says, that they are to decide the case on the evidence, with no extraneous considerations.

"I believe that that is the best that can be done with respect to the problems which—as I said, I regard as extremely important, but at the same time, my attitude—"

COUNSEL FOR THE DEFENDANT DANIELS: "There is only one thing. The only reference I would make to the facts in this case—the victim being white, and that he was a security guard in uniform and acting as a policeman."

COUNSEL FOR THE DEFENDANT ROSS: "I think that factor might suggest the question—this was my series of questions—asking the jurors whether any of their relatives are policemen."

THE JUDGE: "I will be frank with you; I have done that on the juror-by-juror voir dire in a capital case. I have never done it in anything short of a murder case.

COUNSEL FOR THE DEFENDANT ROSS: "This can be done short of juror-by-juror, just by stating that."

THE JUDGE: "I appreciate that."

COUNSEL FOR THE DEFENDANT WILLIAMS: "In behalf of James Williams, I have various questions before the Court right now, as to impartiality, and I understand the Court's position, but I would request the Court to just make general inquiry of the entire panel because whenever you have a situation involving black and white, by way of witnesses, a black witness testifying, and black, as to whether or not these jurors are impartial—"

THE JUDGE: "Let me say, again with the greatest respect for the problem, which is an acute problem, and always will be an acute problem in the courtroom and in the trial of a case involving possible racial prejudice, but one of the things that I say, and it is not the complete reasoning process that I apply to it in terms of orderly and fair administration of the Court, but one of the things I say is that I would be simply astonished if I ever asked a juror, or a group of jurors, or ever heard a lawyer ask a group of jurors if they are white, 'Are you biased against black,' if they are white, or if they are black, 'are you biased against white.' I would be simply astonished if I had an affirmative answer. The man who has the disease of bias would be the last one that would admit it."

COUNSEL FOR THE DEFENDANT WILLIAMS: "Your Honor, just recently I tried that civil rights case before Judge Julian which lasted four weeks, and some of the same questions we asked the entire panel, and I think 20 raised their hands when the Judge asked them certain questions, if they were biased or prejudiced."

THE JUDGE: "I am astonished at that. It is contrary to all of the experience that I have had."

COUNSEL FOR THE DEFENDANT DANIELS: "I tend to agree with you that people like to be good, and racism is bad, but if you ask people in the community, 'Can you be impartial?' They will say they can be. The thrust of these questions is designed to help jurors as well as the Court to bring out within themselves the fact that they might not have considered it themselves."

THE JUDGE: "I am going to adopt Mr. Newman's suggestion that we have a double problem here, not only the problem of skin color, but we also have the problem of someone who is a quasi policeman, so I am going to ask a third question, and that is,—and it is a question some of the other Superior Court Judges are allowing in the area of relations to police—'Are you presently or have you in the past worked for a police department or

formed an opinion.[8] He pointed out that "your oath requires . . . that any verdict that you return must be a fair and impartial verdict based upon the evidence and not based upon any extraneous factors, not based upon any bias or prejudice or preconceived notion or any other experience factor." The veniremen were told that they must raise their hands "[i]f, for any reason, you conclude that you cannot render a fair and impartial verdict, or if you doubt whether you can render a fair and impartial verdict."

It is clear that at least one of the prospective jurors understood that the questions put to him about his prejudice or bias included race prejudice. The defendants were asked to stand up so that the veniremen could see them. The clerk then asked the veniremen the questions outlined by the judge and various other questions previously explained to them but not in dispute here. In answer to the clerk's questions, several prospective jurors raised their hands to indicate possible bias. Those who indicated that they might be biased, prejudiced or had already formed an opinion of the defendants' guilt were then questioned individually by the judge. One prospective juror was excused because of admitted racial prejudice and two were excused for an unspecified prejudice. Seven prospective jurors were ex-

a District Attorney's office, or do you have any relative or relatives who is or was engaged in such work?'

"I know there are one or two judges that have gone much further than that, but most will go no further than that."

[8] General Laws c. 234, § 28, provides: "Examination of jurors. Upon motion of either party, the court shall or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice, therein; and the objecting party may introduce other competent evidence in support of the objection. If the court finds that the juror does not stand indifferent in the case, another shall be called in his stead."

Apart from the question concerning police affiliations, the veniremen were asked (a) "[i]f any of you are related to the defendants or to the victim, or if any of you have any interest in this case or expressed or formed an opinion or is sensible of any bias or prejudice, please make it known to the Court at this time," and (b) "[i]s there any serious reason why you cannot serve upon this jury, considering that you will be locked up, sequestered, living in a hotel away from your home for about a week?"

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cused because they had already formed an opinion, seven were excused because of connections with police work, and one was excused because of his affiliation with the university where the alleged crimes occurred. The final composition of the jury of twelve was ten white persons and two black persons.[9]

Ross asserts that the similarities between his case and the *Ham* case are sufficient to bring him within the rule of that case. We cannot agree. We do not believe that the *Ham* case announced a new broad constitutional principle requiring that questions, designed to discover possible racial prejudice, be put to prospective jurors in all State criminal trials when the defendant is black (or from some other racial minority group), even when the defendant has requested such an inquiry and the statutory framework permits questioning to discover bias.

Justice Rehnquist, writing for the Supreme Court, was careful to limit the language of the court's opinion to the special circumstances of the case under consideration. The court stated: "[W]e think that the Fourteenth Amendment required the judge *in this case* to interrogate the jurors upon the subject of racial prejudice" and more specifically that "the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that *under the facts shown by this record* the petitioner be permitted to have the jurors interrogated on the issue of racial bias" (emphasis supplied). U. S. at .[*] In reaching its decision, the Supreme Court relied upon *Aldridge* v. *United States*, 283 U. S. 308, but we believe that the precedent of the *Aldridge* case, which appears to have been given constitutional dimensions, is to be limited to special circumstances as indicated by the *Ham* case.

As we noted previously, Ham was well known for his civil rights work in the locality where he was tried. The very

[9] The Commonwealth had thirty-one unused peremptory challenges left at this point. See G. L. c. 234, § 29, as amended through St. 1963, c. 137.

[*] 93 Supr. Ct. Reporter at 830.

activities that brought him to public attention specifically focused upon the issue of racial prejudice and Ham raised this matter by claiming that the police were "out to get him" because of his activities.[10] To those members of the jury who might have been prone to racial bias, the defendant Ham would have been a prominent target for their prejudice.

In the instant case, however, there was nothing that pointed to Ross as a special target for racial prejudice. The trial judge addressed the attorneys for the defendants and the Commonwealth in the lobby of the court room and stated that he "thought from something Mr. Donnelly [representing Daniels] said, he might have wanted on the record something which was peculiar to this case, or peculiar to the circumstances which we are operating under here which perhaps he didn't want to say in open court." He then asked, "Is there anything peculiar about it, Mr. Donnelly?" to which Mr. Donnelly replied, "No, just the fact that the victim is white, and the defendants are black." The attorney for Ross, who was present at the lobby conference, did not bring any other special circumstances to the judge's attention and we assume that there were none.

We hold, therefore, that the *Ham* decision does not, in this case, dictate that the trial judge was constitutionally required to question prospective jurors specifically concerning their possible racial prejudices beyond the comments and questions that were put to them. While the due process clause of the Fourteenth Amendment requires the States to insure the essential demands of fairness in criminal trials, we believe that the judge's refusal to ask specific questions designed to discover racial prejudice of the veniremen did not, in this case, violate the defendant's right to the demands of fairness. Contrary to the judge in the *Ham* case,

[10] As we have previously noted, this was Ham's principal defence and thus his credibility as opposed to that of the police was crucial. This issue was not explicitly raised in the instant case. Actually, Ross did not take the stand in his own defence and therefore his credibility was not before the jury.

the judge in the instant case expressly recognized the relevance and importance of the problem. He was meticulously careful in questioning the veniremen upon their bias and prejudice and took great pains to insure that veniremen who expressed doubts about their ability to be impartial were excluded from the jury. We believe that the judge's questions and comments to the veniremen were, in these circumstances, commensurate with the requirements of the Fourteenth Amendment.

Although we hold that the judge's examination of the prospective jurors meets the essential demands of fairness in this case, we perceive that it will be unusual for a trial judge to understand fully the dimensions of a case before he has heard it. The issue of racial prejudice may not be apparent at the outset of a case but may become evident during the trial. Therefore, when a defendant requests that the prospective jurors be questioned about their racial prejudice, the judge should make specific inquiries of counsel concerning the racial aspects of the case. Such an inquiry was properly made in the instant case.[11] If it appears from such preliminary inquiries that the case might reasonably be expected to present factors involving possible racial prejudice, then the judge should question the prospective jurors in this area. In such circumstances, it is within the trial judge's discretion to determine the precise format of the questions to be asked, provided the inquiry is "sufficient to focus the attention of prospective jurors to any racial prejudice they might entertain." U. S. at .[f]

Judgments affirmed.

Michael G. West for the defendant.

Gerald F. Muldoon, Assistant District Attorney *(James M. McDonough,* Legal Assistant to the District Attorney, with him), for the Commonwealth.

Robert H. Quinn, Attorney General, *& Jeremiah O'Sullivan,* Assistant Attorney General, amici curiae, submitted a brief.

[11] See fn. 7, *supra.*

[f] 93 Supr. Ct. Reporter at 851.

Order of United States Supreme Court Denying Certiorari and Dissenting Opinion of Justice Marshall.

No. 73-5273. Ross v. Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: Mass. , 296 N.E. 2d 810.

Mr. Justice Marshall, with whom Mr. Justice Douglas and Mr. Justice Brennan join, dissenting.

Petitioner was convicted in state court of armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder. Petitioner and his codefendants are young Negroes. Their victim was a white, uniformed security guard employed by Boston University. Petitioner requested the trial judge to direct a specific question concerning racial prejudice to the prospective jurors on voir dire.[1] The trial judge refused; instead, he made only the general inquiry mandated by Massachusetts law, whether members of the array had "expressed or formed an opinion, or [were] sensible of any bias or prejudice." The Supreme Judicial Court of Massachusetts affirmed the conviction. Mass. , 282 N.E. 2d 70 (1972). Petitioner sought certiorari on the ground that he had been denied the opportunity to have the jurors examined as to racial bias, a right this Court guaranteed in *Aldridge* v. *United States,* 283 U.S. 308 (1931). We granted certiorari and remanded for reconsideration in light of *Ham* v. *South Carolina,* 409 U.S. 524 (1973). On remand, the Supreme Judicial Court of Massachusetts again upheld the conviction. Mass. , 296 N.E. 2d 810 (1973).

[1] The specific question requested was, "Are there any of you who believe that a white person is more likely to be telling the truth than a black person?"

The importance of the right at issue here — the opportunity to ascertain the racial bias of the veniremen — can hardly be gainsaid. The right to trial by an "impartial jury" is a cornerstone of our system of justice.[2]

> "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. . . . In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworn.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson* v. *City of Louisville*, 362 U.S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' *Reynolds* v. *United States*, 98 U.S. 145, 155." *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961) (footnote omitted).

Accordingly, in *Ham* v. *South Carolina*, *supra*, MR. JUSTICE REHNQUIST, writing for a unanimous Court,[3] found constitutional error in a state court trial judge's refusal to propound

[2] See *Peters* v. *Kiff*, 407 U.S. 493 (1972); *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968); *Swain* v. *Alabama*, 380 U.S. 202 (1965); *Irvin* v. *Dowd*, 366 U.S. 717 (1961); *Dennis* v. *United States*, 341 U.S. 494 (1951); *Lewis* v. *United States*, 146 U.S. 370 (1892); *Pointer* v. *United States*, 151 U.S. 396 (1894).

[3] Although the Court was unanimous on this issue, the author and MR. JUSTICE DOUGLAS dissented on another ground.

a specific question on racial prejudice to the veniremen in the trial of a Negro for possession of marihuana.[4]

> "The State having created [the] statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the petitioner be permitted to have the jurors interrogated on the issue of racial bias." 409 U.S., at 527.

Nonetheless, on remand, the Massachusetts court read our decision in *Ham* as limited by the particular circumstances of that case — the trial of a civil rights worker in the South. The State court found that petitioner, unlike Ham, was not liklely to be a "special target for racial prejudice" and, therefore, that the trial judge did not err in refusing to make the requested inquiry.

This distinction is supported by neither logic nor precedent. MR. JUSTICE REHNQUIST explained the basis for the Court's decision in *Ham* as follows:

> "The inquiry as to racial prejudice derives its constitutional stature from the firmly established precedent of *Aldridge* [v. *United States*] and the numerous state cases upon which it relied, and from a principal purpose as

[4] In *Ham*, as in the case before us, the trial judge asked only the general questions about bias provided for by statute. This Court observed that while a trial judge is not required to put the question about racial prejudice in the exact form suggested by the defendant, the question must be "sufficient to focus the attention of prospective jurors on any racial prejudice they might entertain." *Id.*, at 527. The Court found the general questions propounded by the trial court insufficient for that purpose.

well as from the language of those who adopted the Fourteenth Amendment." 409 U.S. at 528.

In *Aldridge* v. *United States*, 283 U.S. 308 (1931), Mr. Chief Justice Hughes, writing for the Court, found that the "essential demands of fairness" required the trial judge to interrogate veniremen as to racial prejudice in the trial of a Negro for murdering a white policeman. The Court observed that "[no] surer way could be devised to bring the processes of justice into disrepute" than to "permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred." 283 U.S. at 315.

The *Aldridge* Court was not concerned with whether petitioner was unpopular in the community — a special target of prejudice — but rather with the potential racial "bias of the particular jurors who are to try the accused." *Id.*, at 314. The Court did not rely on any particular circumstances to justify its requirements other than the fact that "the possibility of such prejudice [against Negroes] is [not] so remote as to justify the risk in forbidding the inquiry." *Ibid.*[5] (Footnote omitted.) Nor did the Court purport to limit its holding to any region because the "question is not . . . the dominant sentiment of the community. . . ." *Ibid.*

In *Ham*, this Court reaffirmed its commitment to the holding of *Aldridge* and clarified its constitutional underpinnings. The Court emphasized the compelling nature of an inquiry into racial prejudice — the principal target of the Fourteenth Amendment. The Court also indicated the importance of the state cases, of which the *Aldridge* Court said:

[5] Cf. H. Kalven & H. Zeisel, The American Jury 210, 339-344 (1966).

"The practice of permitting questions as to racial prejudice is not confined to any section of the country, and this fact attests the widespread sentiment that fairness demands that such inquiries be allowed." 283 U.S., at 313.

The principle that fairness demands such inquiry is, if anything, far more pervasive today than it was when *Aldridge* was decided, in both federal and state courts.[6]

Yet, the Massachusetts court, by its holding, requires a Negro defendant to establish that he is a special target for racial prejudice before being entitled to an inquiry on racial bias during the voir dire of the jury. In *Aldridge*, this Court weighed the Government's interests in refusing such a question, where it observed that:

"If in fact [the jurors] were found to be impartial, no harm would be done in permitting the question; but if any one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross

[6] See *United States* v. *Carter*, 440 F. 2d 1132 (CA6 1971); *United States* v. *Gore*, 435 F. 2d 1110 (CA4 1970); *Silverthorne* v. *United States*, 400 F. 2d 627 (CA9 1968); *King* v. *United States*, 124 U.S. App. D. C. 138, 362 F. 2d 988 (1966); *Frasier* v. *United States*, 267 F. 2d 62 (CA1 1959); *Smith* v. *United States*, 262 F. 2d 50 (CA4 1958); *United States* v. *Dennis*, 183 F. 2d 201 (CA2 1950), aff'd, 341 U.S. 494 (1951); *Gholston* v. *State*, 221 Ala. 556, 130 So. 69 (1930); *State* v. *Higgs*, 143 Conn. 138, 120 A. 2d 152 (1956); *Pinder* v. *State*, 27 Fla. 370, 8 So. 837 (1891); *Herndon* v. *State*, 178 Ga. 832, 174 S. E. 597 (1934); *State* v. *Jones*, 175 La. 1014, 144 So. 899 (1932); *Giles* v. *State*, 229 Md. 370, 183 A. 2d 359 (1962); *Owen* v. *State*, 177 Miss. 488, 171 So. 345 (1936); *State* v. *Pyle*, 343 Mo. 876, 123 S. W. 2d 166 (1938); *Johnson* v. *State*, 88 Neb. 585, 130 N. W. 282 (1911); *People* v. *Decker*, 157 N. Y. 186, 51 N. E. 1018 (1898); *State* v. *McAfee*, 64 N. C. 339 (1870); *Fendrick* v. *State*, 39 Tex. Cr. 147, 45 S. W. 589 (1898).

injustice would be perpetrated in allowing him to sit." 283 U.S., at 314.

The state court should not be permitted to restrike that balance.

Finally, to say that petitioner is not a potential target of racial prejudice would be to ignore as judges what we must all know as men. That petitioner was tried in Boston, Massachusetts, while Gene Ham was tried in Florence, South Carolina, is of no consequence. Racial prejudice is a cultural malady that has shaped our history as a nation. It is a cancer of the mind and spirit which breeds as prolifically in the industrial cities of the North as in the rural towns of the South.[7] And where, as here and in the strikingly similar circumstances of the *Aldridge* case, a Negro is being accused of an attack on a white policeman, it would be disingenuous at best to assert that he is not apt to be a particular target of racial prejudice.

To deny this petition for certiorari is to see our decision in *Ham* v. *South Carolina* stillborn and to write an epitaph for those "essential demands of fairness" recognized by this Court 40 years ago in *Aldridge*. I fear that we "bring the processes of justice into disrepute" not only by sanctioning the denial of a right required by "essential demands of fairness" but also in failing to compel compliance by the court below with a precedent of this Court barely a year since decided. I would grant the petition.

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[7] Cf. *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189 (1973) (desegregation of the Denver, Colo., school system); *Bradley* v. *Milliken*, 484 F. 2d 215 (CA6), cert. granted, *ante*, p. 1038 (desegregation of the Detroit, Mich., school system). See generally Report of the National Advisory Commission on Civil Disorders (1968).

Docket Entries.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

1974	
January	
25	Application to proceed in forma pauperis, filed.
	Petition for writ of Habeas Corpus, received for filing.
	Petitioner's brief in support of his petition for writ of Habeas Corpus, received for filing.
28	Case referred to Magistrate Davis for findings and recommendations.
February	
6	Deft's motion for enlargement of time to answer, filed. c/s.
11	Deft's motion to dismiss, filed. c/s.
28	Marshals return of summons wso Frank A. Hall on 2/1/74 and on Theodore Ristaino on 2/5/74, filed.
March	
20	Pltf's request that this case be consolidated with MC 73-150-M, DENIED by J. Murray.
June	
20	SKINNER, J. Appearance of Dennis J. LaCroix for the respondents filed. Respondent's memo, filed. Court appoints Michael West to represent petitioner nunc pro tunc to filing of petition; hearing on respondents motion to dismiss; arguments by counsel; taken under advisement.
24	SKINNER, J. MEMORANDUM AND ORDER ENTERED. ". . . . The writ of habeas corpus shall issue unless within 120 days from the date this order

becomes final the Commonwealth shall have instituted proceedings to retry the petitioner in accordance with principles stated above." Copies to counsel and Mass Lawyers Weekly.

July

1 Respondents Notice of Appeal filed. Cpy to counsel.

17 Certified copy of docket entries and copies of the original pleadings delivered to the Court of Appeals.

October

16 Order of Court received from the Court of Appeals entered. . . . It is ordered that the order of the district court directing the writ of habeas corpus to issue unless within 120 days from the date the said order becomes final, the Commonwealth shall have instituted proceedings to retry the petitioner, be, and the same hereby is, stayed until further order of this court.

1975

January

27 Mandate entered 12/31/74 entered. . . . The order of the district court is affirmed with the following directions: That court is directed to issue the writ of habeas corpus unless within 90 days from the date of this judgment the Commonwealth has either instituted proceedings to retry the petitioner or applied for a writ of certiorari. If certiorari is sought and granted, the issued of the writ of habeas corpus shall be stay pending further order of the Supreme Court. If certiorari is sought and denied, the

writ of habeas shall issue unless the Commonwealth has instituted proceedings to retry the petitioner within 30 days after the date certiorari is denied. No costs. Original pleadings returned from the Court of Appeals.

Petition for Writ of Habeas Corpus.

Now comes the Petitioner, JAMES ROSS, JR., and petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 on the grounds that he is in custody in violation of the United States Constitution.

I

Petitioner, JAMES ROSS, JR., is presently serving concurrent sentences of 18-30, 6-10 years at the Massachusetts Correctional Institution, Norfolk.

II

Respondent, THEODORE RISTAINO is Acting Superintendent of the Massachusetts Correctional Institution, Norfolk, and is responsible for the immediate custody and control of petitioner.

III

Respondent, FRANK A. HALL is Commissioner of Correction, Commonwealth of Massachusetts, and has general supervision and control over the correctional institutions of the Commonwealth, and all officers and employees of the Department of Correction.

IV

Petitioner was tried in Suffolk County Superior Court before judge and jury on June 17, 1970 through July 2, 1970

on three indictments charging him with armed robbery (Indictment No. 48032) and assault and battery by means of a dangerous weapon (Indictment No. 48112) and assault and battery with intent to murder, (Indictment No. 48033). On July 2, 1970, he was convicted on all three indictments and sentenced to the Massachusetts Correctional Institution, Walpole, for concurrent terms of 18-30 years for armed robbery, 6-10 years for assault with a dangerous weapon and 18-20 years for assault and battery with intent to murder.

V

Before trial and prior to the impanelling of the jury, Counsel for the Petitioner Ross, submitted a motion to the judge which proposed various questions to be asked to the prospective jurors including one question dealing with racial prejudice. The trial judge denied Petitioner's request to have questions as to racial prejudice asked directly to the prospective jurors. Copies of the relevant portions of the trial transcript and of the appellate records are attached hereto and marked Exhibits "A" and "B".

VI

Petitioner was subsequently convicted of armed robbery, assault by means of a dangerous weapon, and assault and battery with intent to murder primarily through the identification testimony of a white gas station attendant.

VII

Petitioner's final deliberating jury consisted of 10 whites and 2 blacks.

VIII

Petitioner appealed his conviction to the Supreme Judicial Court of Massachusetts, pursuant to Massachusetts General Laws, Chapter 278, §§ 33A-33C, claiming that the refusal of the trial judge to ask potential jurors questions concerning prejudice against blacks violated the Petitioner's rights under the Fourteenth Amendment. The Supreme Judicial Court affirmed the conviction on April 27, 1972. Petitioner then filed a timely Petition for writ of certiorari in the United States Supreme Court. On January 22, 1973, the United States Supreme Court granted Petitioner's writ of certiorari, vacated judgments and remanded the case to the Supreme Judicial Court for rehearing in light of *Ham* v. *South Carolina*, 409 U.S. 524 (1973). On April 2, 1973, rehearing was held and on May 29, 1973, the Supreme Judicial Court again affirmed Petitioner's conviction. Again a timely petition for writ of certiorari was filed in the United States Supreme Court and on December 3, 1973 said petition was denied. (A copy of the judgment and opinion of the Supreme Judicial Court is attached hereto and marked Exhibit "C." In addition, the denial of Petitioner's writ of certiorari and the dissenting opinion filed by Mr. Justice Marshall, Mr. Justice Douglass and Mr. Justice Bremen are attached hereto and marked as Exhibit "D."

IX

Petitioner has exhausted his state remedies in accordance with 28 U.S.C. § 2254, as demonstrated hereinabove in paragraph 8.

X

Petitioner has been denied his rights under the due process clause and the equal protection clause of the Fourteenth Amendment by the failure of the trial judge to question jurors concerning racial prejudice in direct contravention to the mandate of the United States Supreme Court in *Ham* v. *South Carolina*, 409 U.S. 524 (1973).

WHEREFORE, Petitioner says that he is being restrained of his liberty by respondents in violation of the Constitution and prays that the writ of habeas corpus issue an order discharging him from custody be entered.

JAMES ROSS, JR.
By his attorney,
MICHAEL G. WEST, J.D.
for KAMBERG, BERMAN & HENDEL, P.C.

Return.

Now come the respondents, Frank A. Hall and Theodore Ristaino, in the above-entitled matter, and through their attorney, make the following return to this Court's Order to show cause issued in said matter on February 7, 1974.

1. That on July 2, 1970, the petitioner was found guilty by a jury on three indictments against him in Suffolk County.
2. That said indictments charged petitioner with robbery being armed, assault with intent to murder and assault and battery with a dangerous weapon.
3. That upon the aforementioned finding of guilty on said indictments, the Superior Court for Suffolk County on July 2, 1970 imposed sentences on the petitioner of 18-30 years on the

first indictment, 18-20 years on the second, and 6-10 years on the third, all to be served concurrently. (See attached copies of the warrants of committment against petitioner.)

4. That petitioner was committed to the Massachusetts Correctional Institution at Walpole on July 2, 1970.

5. That on August 28, 1970, the petitioner was transferred to the M.C.I. at Norfolk.

6. That on September 9, 1970, the petitioner was transferred to the M.C.I. at Walpole.

7. That on October 24, 1972, review of the sentences imposed on petitioner as described above came before the Justices of the Appellate Division; that the petitioner voluntarily refused to appear before said Justices on this day; that the Justices ordered that the judgments imposing the sentences stand and that the appeal be dismissed with prejudice. (See attached copy of the Order of the Appellate Division.)

8. That on December 12, 1973, the petitioner was transferred to the M.C.I. at Norfolk where he is now incarcerated

9. And further answering, the respondent says that petitioner's allegations on the issue of the proper scope of *voir dire* examination have been carefully and fully considered by the Supreme Court of the United States and the Supreme Judicial Court of Massachusetts, and that said issue does not warrant further consideration by this Honorable Court.

Respectfully submitted,

ROBERT H. QUINN
Attorney General

By DENNIS J. LACROIX
Deputy Assistant Attorney General

Appendix B.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

JAMES ROSS, JR., PETITIONER,	•	
v.	•	CIVIL ACTION No. 74-15-S
THEODORE RISTAINO ET AL., RESPONDENTS.	•	

MEMORANDUM AND ORDER

June 24, 1974

SKINNER, D.J.

Petitioner was convicted of armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder. Petitioner is black, and the victim, a security guard at Boston University, is white. At the trial, petitioner's counsel asked the judge to put the following question to the jurors in the course of a *voir dire*:

> "5. Are there any of you who believe that a white person is more likely to be telling the truth than a black person?"

Counsel for co-defendants asked for other questions directed to the issue of racial prejudice.

The trial judge declined to ask the requested questions, but did give instructions and ask questions of the jurors which dealt meticulously and extensively with the general issue of bias and prejudice, but did not specifically direct the jurors' attention to the possibility of racial prejudice. The defendant had been identified to the jurors. Two of the jurors asked to be excused because they were prejudiced. One stated explicitly that the prejudice which he entertained was racial. The other's prejudice was not identified. Various other jurors were excused because of preconceived opinions and connections with the police or with Boston University.

On appeal to the Supreme Judicial Court of Massachusetts, the petitioner's convictions were upheld. *Commonwealth* v. *Ross*, 1972 A.S. 873, 282 N.E. 70 (1972). The United States Supreme Court granted certiorari, vacated the judgment and remanded the case for reconsideration in the light of its decision in *Ham* v. *South Carolina*, 409 U.S. 524 (1973). *Ross* v. *Massachusetts*, 410 U.S. 901 (1973). The Supreme Judicial Court reconsidered the case and again affirmed. *Commonwealth* v. *Ross*, 1973 A.S. 839, 296 N.E. 2d 810. Ross' second petition for certiorari to the United States Supreme Court was denied, with vigorous dissents by Justices Marshall, Douglas and Brennan. *Ross* v. *Massachusetts*, 414 U.S. 1080.

In *Ham* v. *South Carolina*, *supra*, the Court held that Ham, a well-known black activist charged with possession of marijuana, was entitled to have the judge put a question to the prospective jurors specifically directed to the issue of racial prejudice. The Court relied on *Aldridge* v. *United States*, 283 U.S. 308 (1931), in which it was held that such a question was required in a trial in a federal court, as one of the "essential demands of fairness."

On remand, the Supreme Judicial Court treated *Ham* as being limited to situations in which the defendant had become a "special target" of discrimination, relying on the use by Mr. Justice Rehnquist of such common judicial locutions as "in this case" and "under the facts shown on this record."

The *Ham* opinion rests on *Aldridge*, however, and the defendant in *Aldridge* was nobody of special notoriety prior to his indictment. The true significance of *Ham* is that it extends the rule of *Aldridge* to trials in state courts.

In *Aldridge*, the black defendant was tried for the murder of a white policeman in the District of Columbia. Defense counsel requested a *voir dire* interrogation of prospective jurors on the issue of racial prejudice, and the court refused to grant it. It was held that the "essential demands of fairness" required that such a question, in some form, be put to prospective jurors, if requested. In the opinion* Chief Justice Hughes quotes the following passage from *People* v. *Reyes*, 5 Cal. 347, 349.

> "As the juror best knows the condition of his own mind, no satisfactory conclusion can be arrived at, without resort to himself. Applying this test then, how is it possible to ascertain whether he is prejudiced or not, unless questions similar to the foregoing are propounded to him."

The questions propounded to the jurors in the present case were directed to the general issue of bias and prejudice, and were far more extensive and carefully worded than those given in *Aldridge* and *Ham*. *They were exemplary in every respect, except the failure to specifically direct the attention of the jurors to the issue of racial prejudice*. In substance, they were no different than the ones given in *Ham*. The fact that one juror responded that he suffered from racial prejudice and was

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* At 283 U.S. 313.

excused does not cover the situation, because his perception can not be imputed to the twelve who were chosen.

In the instant case, there was a white victim. The offense in *Ham* was victimless, i.e., possession of marijuana. The likelihood of infection of the verdict was at least as great as it was in *Ham*. The facts are, indeed, "strikingly similar" to those in *Aldridge*. *Ross* v. *Massachusetts*, 414 U.S. 1080, 1085. ***The petitioner had a constitutional right to have the issue of racial prejudice specifically called to the attention of the prospective jurors on the voir dire examination.***

By reason of long personal experience in the prosecution of criminal cases in state courts, I am acutely aware of the burden on the courts, law enforcement officers and victims imposed when a state court conviction is set aside by a federal court. I am also conscious of the respect which federal courts owe the highest court of the state. The mandate of *Ham* is so clear, however, and the rule announced is so fundamental that I have no choice but to enter the following order:

The writ of habeas corpus shall issue unless within 120 days from the date this Order becomes final the Commonwealth shall have instituted proceedings to retry the petitioner in accordance with principles stated above.

_____
U.S. District Judge

Notice of Appeal.

Notice is hereby given that Theodore Ristaino and Frank A. Hall, the respondents named above, hereby appeal to the United States Court of Appeals For The First Circuit from the Memorandum and Order entered in this action on June 24, 1974 by the United States District Court For The District of Massachusetts. Said Order requires that a writ of habeas corpus shall issue unless within 120 days from the date this Order becomes final, the Commonwealth shall have instituted proceedings to retry the petitioner in accordance with the principals stated in said Memorandum.

Respectfully submitted;

ROBERT H. QUINN
Attorney General

by: DENNIS J. LACROIX
Deputy Assistant Attorney General
Criminal Division
131 Tremont Street
Boston, Massachusetts 02111

Docket Entries.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

1974

July

18 Notice of Appeal filed in one volume.

22 Request for counsel filed. Order (McEntee, J.) appointing Michael G. West, Esquire, counsel for appellee. Order (McEntee, J.) granting leave to appellee to file four copies of his brief. Notices mailed.

24 Statement and designation filed.
Appearance of Michael G. West, Esq., filed for appellee.
Motion filed. Order (Cambpell, J.) ordering that the time for filing brief for appellant be filed on or before August 14, 1974; and further ordering the brief for appellee be filed on or before August 28, 1974. Notices to counsel.

26 Appearances of Robert H. Quinn and Dennis J. Lacroix for appellants filed.

August

14 Brief for appellant filed.
Designated transcript in one volume filed.
Appendix to brief for appellees filed in one volume.

26 Appearances of Robert H. Quinn and Dennis J. LaCroix for appellants filed.

28 Brief for appellee filed by leave of court.

September

10 Heard before Coffin, Moore & McEntee, J.J.

October

16 Order (Coffin, Ch.J.) staying order of the district court directing writ of habeas corpus to issue unless within 120 days from date of said order becomes final, until further order of this court. Notices to counsel.

December

31 JUDGMENT: Judgment affirming the order of the district court with instructions. Notices mailed. Opinion by McEntee, J., dissenting opinion by Moore, Senior Circuit Judge (2nd (Cir.) NO COSTS!

1975

January

27 Mandate issued, copy filed and original papers returned to the district court. Notices mailed.

March

31 Notice of filing petition for certiorari (74-1216) filed 3/26/75.

June

2 Certified copy of order of Supreme Court granting certiorari (5/27/75) filed. Certified copy of appendices and proceedings to Supreme Court. Notices mailed.

United States Court of Appeals
For the First Circuit

No. 74-1222

THEODORE RISTAINO ET AL.,

RESPONDENTS, APPELLANTS,

v.

JAMES ROSS, JR.,

PETITIONERS, APPELLEES,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
MCENTEE, *Circuit Judge*, and MOORE,*
Senior Circuit Judge.

Dennis J. LaCroix, Deputy Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, and *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Division, were on brief, for appellants.

Michael G. West, by appointment of the Court, with whom *Kamberg, Berman & Hendel, P.C.* was on brief, for appellee.

December 31, 1974

MCENTEE, *Circuit Judge*. We are required in this case to decide whether it was a denial of due process, where the defendant was a black man accused of violent crimes against a white security officer, for a state court judge to deny a defense request to interrogate prospective jurors specifically on the issue of racial prejudice.[1]

* Of the Second Circuit sitting by designation.

[1] The defendant's motion for examination of proposed jurors asked that various questions be put to the *voir dire* panel. The question which this litigation involves was "Are there any of you who believe that a white person is more likely to be telling the truth than a black person?"

The Commonwealth of Massachusetts appeals from a memorandum and order entered by the district court granting a writ of habeas corpus to appellee, who was convicted of armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder. The Massachusetts Supreme Judicial Court unanimously affirmed these convictions, *Commonwealth* v. *Ross*, 1972 Mass. Adv. Sh. 873, 282 N.E.2d 70, but the United States Supreme Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of *Ham* v. *South Carolina*, 409 U.S. 524 (1973). *Ross* v. *Massachusetts*, 410 U.S. 901 (1973). On remand the Supreme Judicial Court held that *Ham* did not affect the result reached in its earlier deliberation, *Commonwealth* v. *Ross*, 1973 Mass. Adv. Sh. 839, 296 N.E.2d 810.[2] Ross sought a writ of habeas corpus from the district court, which the court granted, saying:

> "The questions propounded to the jurors in the present case were directed to the general issue of bias and prejudice, and were far more extensive and carefully worded than those given in *Aldridge* [v. *United States*,

[2] After the decision of the Massachusetts Supreme Judicial Court on remand, Ross again filed a petition for certiorari with the United States Supreme Court. The Court denied the petition, *Ross* v. *Massachusetts*, 414 U.S. 1080 (1973), but Justice Marshall filed an opinion, in which Justices Douglas and Brennan joined, dissenting from the denial. This part of the procedural history of this case has no legal effect in this court. The denial of a petition for certiorari from a state court judgment affirming a conviction has no legal significance when an application for a writ of habeas corpus thereafter comes before a district court. *Brown* v. *Allen*, 344 U.S. 443, 488-97 (1953) (opinion of Justice Frankfurter, for a majority of the Court). That only three Justices voted to grant Ross's second petition for certiorari does not mean that five or more Justices were voting, or even would have voted, to affirm on the merits the decision of the Massachusetts Supreme Judicial Court on remand. That the three dissenting Justices filed a lengthy opinion with the denial of certiorari does not reverse the effect to be accorded the denial; the opinion only indicates how strongly those Justices feel about the case. Denial of certiorari may be motivated, among other reasons, by a desire "to have different aspects of an issue further illumined by the lower courts," *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (opinion of Justice Frankfurter respecting denial of certiorari), or by a preference for administrative reasons to have the prisoner seek habeas corpus in the district court. *See generally* R. Stern & E. Gressman, Supreme Court Practice §§ 5.4-5.7 (4th ed. 1969).

283 U.S. 308 (1931),] and *Ham*. They were exemplary in every respect, except the failure to specifically direct the attention of the jurors to the issue of racial prejudice. In substance, they were no different than the ones given in *Ham*. The fact that one juror responded that he suffered from racial prejudice and was excused does not cover the situation, because his perception cannot be imputed to the twelve who were chosen.

"In the instant case, there was a white victim. The offense in *Ham* was victimless, i.e., possession of marijuana. The likelihood of infection of the verdict was at least as great as it was in *Ham*. . . . The petitioner had a constitutional right to have the issue of racial prejudice specifically called to the attention of the prospective jurors on the *voir dire* examination."

In *Ham* v. *South Carolina*, *supra*, the defendant was a black civil rights leader charged with possession of marijuana. His defense was that the police were out to get him and were framing him on the drug charge. His counsel requested the judge to ask on *voir dire* two questions designed to ferret out any possible racial prejudice against the defendant.[3] The judge did put three general questions to the prospective jurors on the issue of bias, but he refused to ask any question directed specifically to racial prejudice. The Supreme Court, in a unanimous opinion, held "that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice." 409 U.S. at 527. The contours of the *Ham* decision were not sharply defined by the Court. Justice Rehnquist's opinion

[3] The two questions sought to be asked were:

"1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?

"2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'?" 409 U.S. at 525 n. 2.

did not explicitly state that whenever a black defendant requests the trial judge to inquire specifically on the issue of racial prejudice on *voir dire* the trial judge must do so. Nor did the opinion explicitly state that the defense request for specific questions directed to racial prejudice need only be honored where the defendant was a civil rights leader or other "special target of racial prejudice,"[4] which was the construction the Supreme Judicial Court gave *Ham*.[5] *Commonwealth* v. *Ross*, 1973 Mass. Adv. Sh. 839, 296 N.E.2d 810.

Under the view we take of the facts in this case, however, we are not required to resolve this ambiguity. In *Ham* the defendant was a civil rights leader, while in this case the black defendant is for the purpose of this inquiry an ordinary black citizen. But in this case, the charges against the

[4] If a juror were prone to racial bias, we question whether it is reasonable to conclude that he would confine that bias, and its destructive effects on his impartiality, to cases where the defendant was a civil rights leader. That the juror might be particularly prone to vent his bias in such a case in no way supports the conclusion that he would be an impartial juror in the absence of such a special factor, as the due process clause requires, *see Peters* v. *Kiff*, 407 U.S. 493, 501 (1972) (opinion of Justice Marshall).

[5] Other state cases suggest any black criminal defendant, target or not, who requests a specific inquiry about racial prejudice is entitled to it. *Cochran* v. *State*, 505 S.W.2d 520 (Ark. 1974) (prosecution for assaulting an officer during an assemblage or riot); *McNichols* v. *State*, 279 So.2d 377 (Fla. App. 1973) (state confessed error; facts not stated); *Mize* v. *State*, 131 Ga. App. 538, 206 S.E.2d 530 (1974) (black defendant charged with simple battery against white prosecutrix entitled to question on racial prejudice); *Reid* v. *State*, 129 Ga. App. 657, 200 S.E.2d 454 (1973) (error not to allow black woman charged with theft to have questions concerning racial bias); *People* v. *Wray*, 49 Mich. App. 344, 212 N.W.2d 78 (1973) (black defendant charged with carrying concealed weapon in motor vehicle entitled to question all-white jury on racial bias); *Shabazz* v. *State*, 506 S.W.2d 60 (Mo. Ct. App. 1974) (dictum); *People* v. *Rubicco*, 42 App. Div. 2d 719, 345 N.Y.S.2d 624 (2d Dept. 1973), *aff'd on another ground*, 34 N.Y.2d 841, 316 N.E.2d 344, 359 N.Y.S.2d 62 (1974) (possession of gambling records; "reversible constitutional error" to deny motion to ask jurors whether they are biased against Italians); *People* v. *Williams*, 41 App. Div. 2d 611, 340 N.Y.S.2d 504 (1st Dept. 1973) (narcotics convictions reversed because of "direct conflict with . . . *Ham*"). *But see United States* v. *Walker*, 491 F.2d 236 (9th Cir.), *cert. denied*, 416 U.S. 990 (1974) (prosecution for uttering forged U. S. treasury check; inquiry about racial prejudice not mandated because no racial overtones shown); *Commonwealth* v. *Brown*, 228 Pa. Super. 166, 323 A.2d 281 (1974) (conviction for forcible rape affirmed by 3 to 2 vote; requested racial question held irrelevant and overbroad).

defendant involved violence against a white, not a victimless crime like possession of marijuana. Moreover, the white victim, a security officer at Boston University, had a status close to that of a police officer. In addition, the eyewitness testimony of a white gas station attendant was a major part of the state's case against Ross. On these facts the district court was not in error in concluding that "[t]he likelihood of infection of the verdict [by racial prejudice] was at least as great as it was in *Ham*." In effect, the court held that a black defendant charged with violent crimes against a white security officer would be likely to be a special target of racial prejudice.

Our dissenting brother suggests that the rule of *Ham* should only apply to cases brought to trial after the date *Ham* was decided. However, we do not feel the writ should be denied on the ground that *Ham* should not be given retroactive application. The Supreme Court implicitly decided that *Ham* applied to this case when it summarily vacated the judgment of the Supreme Judicial Court of Massachusetts and remanded the case to that court for reconsideration in light of *Ham*. *See Ross* v. *Massachusetts*, 410 U.S. 901 (1973).

It is not a significant distinction between this case and *Ham* that Ham took the stand and put his credibility in issue, while Ross did not take the stand. If a juror is prejudiced against blacks, he would not be able to appraise the defense offered by the black defendant impartially, whether or not that defense included the defendant's taking the stand. Nor is it particularly relevant that the trial court here doubted that questions directed to discovering racial prejudice would result in any admissions of bias. This objection would apply equally well to other questions the court is required to put to proposed jurors. *See* Mass. Gen. Laws Ann. c. 234, § 28 (Supp. 1974). For example, a proposed juror biased by pretrial publicity might aver he is not biased or a juror who believes anyone indicted is guilty as charged might answer that he believes the defendant is innocent until proven guilty, yet we do not allow the possibility of a false answer to serve as an excuse for not asking these questions.

By deciding in this case that the trial judge should have questioned the proposed jurors specifically on the question of racial prejudice, we do not hold that he had to ask the specific questions sought by Ross's counsel. "[T]he trial judge was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner." *Ham* v. *South Carolina*, *supra*, at 527. *See Featherston* v. *United States*, 491 F.2d 96 (5th Cir.), *cert. denied*, 94 S.Ct. 3176 (1974). The trial judge has broad discretion as to the questions be asked regarding racial prejudice.[6]

The writ of habeas corpus shall issue unless within 90 days from the date of this opinion the Commonwealth has either instituted proceedings to retry the petitioner or applied for a writ of certiorari. If certiorari is sought and granted, the issuance of the writ of habeas corpus shall be stayed pending further order of the Supreme Court. If certiorari is sought and denied, the writ of habeas corpus shall issue unless the Commonwealth has instituted proceedings to retry the petitioner within 30 days after the date certiorari is denied.

So ordered.

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[6] We observe with respect to our brother's dissenting opinion that whenever trial judges are vested with broad discretion it is possible to evoke Pandora, but only if one assumes that discretion will be thrown to the winds. As for this and the other points made, we come to rest with the conviction that they would apply equally to the case presented in *Ham*.

MOORE, *Circuit Judge* (Dissenting). The sole issue on this appeal relates to the *voir dire* examination of prospective trial jurors during which the trial judge denied a specific request on behalf of the petitioner, Ross, to ask a particular question, accurately stated by the majority as follows: "Are there any of you who believe that a white person is more likely to tell the truth than a black person?" No question was sought by Ross' counsel addressed to prejudice against Ross as a black. Other questions addressed to prejudice against blacks were requested by co-defendants not involved on this appeal. In my opinion the request of Ross' counsel cannot be given the broad interpretation that the majority has given in saying that it was "a defense request to interrogate prospective jurors specifically on the issue of racial prejudice."

The majority hold, as did the District Court, that the failure of the trial judge to question "the proposed jurors specifically on the question of racial prejudice" amounted to a denial of constitutional due process. In so holding, they rely primarily on the recent Supreme Court decision in *Ham* v. *South Carolina*, 409 U.S. 524 (1973), although they concede that the *Ham* opinion "did not explicitly state that whenever a black defendant requests the trial judge to inquire specifically on the issue of racial prejudice on *voir dire* the trial judge must do so."

If the District Court be correct in saying that "The petitioner had a constitutional right to have the issue of racial prejudice specially called to the attention of the prospective jurors on the *voir dire* examination." and *if* it was a "denial of due process" of constitutional dimension to deny a defense request to interrogate prospective jurors specifically on the issue of racial prejudice and *if* the District Court had no choice but to enter the order granting the writ of habeas corpus because "The mandate of *Ham* is so

clear . . .", then, in my opinion, Pandora's box of potential evil has indeed been opened wide and I look with Cassandra-like foreboding upon the future of the *voir dire* jury examination in cases involving black defendants.

Starting with the question, which the majority quite accurately states this litigation involves, "Are there any of you who believe that a white person is more likely to be telling the truth than a black person?", I find no relation between such a question and the ultimate desideratum, namely, to uncover racial prejudice against a black defendant. Such a question could not be properly answered unless prosecution and defense read to the prospective juror the name and color of all witnesses they intended to call. Even then it would be impossible to obtain a juror's pre-trial commitment as to a witness' credibility until the particular witness had been seen and heard. Will it be constitutionally impermissive to deny interrogation as to a prospective juror's feelings as to the credibility of a witness of the "X" race, nationality or religion? Illustrative of the problem are questions proposed by petitioners' co-defendants:

> "18. Do you have any feelings either for or against persons of the Black race who wear the Afro style haircut and long sideburns?" (App. p. 56) or
>
> "7. Do you feel that this increase (in crime) is due primarily to blacks in the city?" and
>
> "12. Do you object to the number of blacks and Puerto Ricans on the welfare rolls in the city?" (App. p. 58.)

The other forty questions sought to be asked by these co-defendants were undoubtedly intended in good faith by counsel to ferret out the more intimate prejudices of the panel which was to pass judgment on their clients but query, did not the state trial judge probe sufficiently deeply, as a practical matter, in inquiring "Can you under oath return

a fair and impartial verdict based upon the evidence that you hear in the courtroom and not upon any extraneous factors; no bias or prejudice or personal interest in the case, and no prejudice of any kind." (App. p. 494.)

Petitioner argues that the state judge's failure to focus the attention of the prospective jurors as to any racial prejudice they might entertain is "as a matter of constitutional law" reversible error. If this is to be the rule by judicial legislation, in fairness to trial judges, state and federal, the rule should only be so promulgated for future cases.

The District Court concedes that the questions propounded on the general issue of bias and prejudice were exemplary in every respect "except the failure to specifically direct the attention of the jurors to the issue of racial prejudice." However, if there are to be rules they should be clear and capable of objective application. In other words, it is easy to understand and apply a rule which requires a trial judge in every case in which there is a black defendant to inquire of each individual juror whether he would be adversely prejudiced against such a person because of his race. But is the trial judge duty bound to ask such a question in the absence of a request? If he asks the question *sua sponte*, the appeal in all probability will be on the ground that he injected the racial issue into the case — hence reversible error. If he fails to ask the question, the same result will obtain and, if counsel fails to make the request, incompetence of counsel will be the charge on the habeas corpus application.

The importance of appellate pronouncements in the field of trial procedure is because of the guidance they should give to trial judges. What are we telling the trial judge as to how he should conduct the *voir dire* on the next trial so as to avoid constitutional error?

A "next" trial can be assumed. Only a few years have

elapsed since the first trial. The witnesses and their whereabouts in all probability are known. The facts supporting guilt as found on the first trial may be read in the two opinions of the Massachusetts Supreme Judicial Court.[7] But juries, not courts, are to determine guilt or innocence and the method of selection of the jury will be the most important element initially.

Neither *Aldridge*,[8] *Ham*, *supra*, the District Court opinion nor this court's opinion will be of real value as guidelines. *Aldridge* and *Ham* indicate that questions regarding racial prejudice must be asked. And, although *Ham* and the majority state that the questions need not be "in any particular number" or form, *Ham*, at 527, only an appellate court will be able to decide whether the future trial judge will have properly exercised that "broad discretion" with which appellate courts so liberally endow him.

If the courts are satisfied to accept "No" to the single question "Are you prejudiced against blacks?" and this colloquy is considered to be constitutionally sufficient, such a question should be permitted if counsel should choose to request it. But the courts are not so easily satisfied — and probably properly so. Few jurors will reveal the innermost workings of their minds — particularly in public. The mere "obtaining jurors' assurances of impartiality is insufficient [to test that impartiality]."[9] The courts have said that a prospective juror's eligibility "should not be adjudged on that juror's own assessment of self-righteousness *without something more.*"[10]

It is all very well to speak of a standard to be used in

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[7] *Commonwealth* v. *Ross*, 282 N.E.2d 70 (1972) and 296 N.E.2d 810 (1973).

[8] *Aldridge* v. *United States*, 283 U.S. 308 (1931).

[9] *United States ex rel Bloeth* v. *Denno*, 313 F.2d 364 at 372 (2nd Cir. 1963), *cert. denied*, 372 U.S. 978.

[10] *Silverthorne* v. *United States*, 400 F.2d 627, 639 (9th Cir. 1968). (Emphasis in original).

the exercise of discretion in passing upon requested inquiries as meeting "the essential demands of fairness." *Aldridge, supra,* at 310 but, what these demands may be, will only be known to the trial judges years later in the opinion of some appellate court.

Take for example a single instance derived from this case because it falls into the category of the "something more" field of inquiry. A proposed question submitted to the trial judge here followed the questions: "Do you have children? Do they go to public schools?" and was:

> "16. If in private schools, is this a result of your feelings towards the number of blacks and Puerto Ricans in the school system?"

In view of certain situations recently reported in the public press existing in Eastern Massachusetts with respect to the public schools such a question might well be included in a probing group, including "Are you at all nervous about walking the streets of your town or city after dark?" Almost unlimited questions along this line can be conjured up for obtaining a true picture of the potential juror's mind. To obtain such a picture the *voir dire* might well more properly be relegated to the psychiatrist.

However, our present concern must be this case. We are given some 120 pages of transcript devoted entirely to the trial judge's efforts to obtain an impartial jury. Successive panels were interrogated. The defendants who are black stood before the prospective jurors. The trial judge was most specific as to "bias or prejudice" generally. The jurors knew when asked about prejudice that the defendants were black. Each juror was given an opportunity to approach the Bench and express whatever his own personal reasons for not wishing to serve. Any possible reluctance to express racial bias or prejudice in public was thus avoided. In fact two jurors were excused because of prejudice; one in particular, because of racial prejudice. The ultimate jury consisted of 10 whites and 2 blacks. No incident has been pointed out to us which might indicate that this was not a normal and average American jury which heard the evidence and reached their verdict thereon. If there is to be a new *voir dire* rule, mandating upon request the injection of a racial prejudice issue into the case, I am not prepared to fault the trial judge for not knowing it before it was promulgated.

Finally, I am not unmindful of the fact that a distinguished court (the Massachusetts Supreme Judicial Court) has twice passed upon the issue of fair trial for this defendant. After the first affirmance certiorari was granted and the case remanded for reconsideration in light of *Ham*. That reconsideration was given and again there was affirmance. Certiorari was denied, three Justices vigorously dissenting, as appears in the opinion of Mr. Justice Marshall. 414 U.S. 1080.

The Supreme Court has stated that denial of certiorari has no legal significance — at least as to the merits of the controversy. Nor would I question the sound philosophy behind such an interpretation. Two cases in particular in which the opinions were written by Mr. Justice Frankfurter clearly demonstrate that "such a denial (of certiorari) carries with it no implication whatever regarding the Court's views on the merits of the case which it has declined for review." *Maryland* v. *Baltimore Radio Show,* 338 U.S. 912, 918 (1950). Again in 1953 the Supreme Court devoted itself in *Brown* v. *Allen,* 344 U.S. 443 (1953), to the effect, if any, which might be attributed to denial of certiorari. In a separate opinion (pp. 488-497) Mr. Justice Frankfurter set forth most specifically the reasons why no effect should be given to denial. The many instances cited of petitions "rarely drawn by lawyers," "almost unintelligible,"

inadequate records, no clear statements of the issues, the lack of importance of the issues, the mere numerical quantity of the petitions, all justify the conclusion that "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, . . ."[11] Quite rightly did the Justice say: "The reasons why our denial of certiorari in the ordinary run of cases can be any number of things other than a decision on the merits are only multiplied by the circumstances of this class of petitions." *Brown, supra,* at 497. However, this very expression is pregnant with the possibility as Mr. Justice Jackson pointed out in his separate opinion that "There may be circumstances so extraordinary that I do not now think of them which would justify a departure from this rule, but the ordinary run-of-the-mill case certainly does not." *Brown, supra,* at 545.

This small opening in an otherwise seemingly impregnable fortress entitles one to peer into the interior — a hypothetical conference chamber in which consideration of certiorari in this case is being discussed. *Ham* for all practical purposes had just been decided. The constitutional issue of the "black" question presented by *Ross* was so clear that a remand was directed in light of *Ham*. When *Ross* next arrived it was in the same garb — no other questions, no procedural issues, no diminution in importance of the only issue — just the same single "black" question. If there were any doubt on the subject Mr. Justice Marshall must have made all conscious of the singleness of the issue in his dissent, Justices Douglas and Brennan joining. Under these circumstances I would be reluctant to characterize this case as an "ordinary run-of-the-mill case." The intervening remand had not created a new issue. If the absence of the "black" question called for remand on the

[11] *United States* v. *Carver*, 260 U.S. 482, 490 (1923).

first petition, its continued absence must have been noted on the second. Very possibly the denial of the *Ross* second certiorari petition has no legal significance but in my opinion the scope and intent of *voir dire* in the specific field of bias and prejudice as presented here has great legal significance. If counsel are permitted to endeavor to obtain via the *voir dire* a juror's commitment as to his views of prospective witnesses' credibility I foresee countless future appeals arising therefrom.

For these reasons — but primarily because I believe that the petitioner received a fair trial in Massachusetts — I dissent and would reverse the granting of the writ.

United States Court of Appeals for the First Circuit.

No. 74-1222.

JAMES ROSS, JR.,
PETITIONERS, APPELLEES,

v.

THEODORE RISTAINO ET AL.,
RESPONDENTS, APPELLANTS.

JUDGMENT

Entered December 31, 1974

The order of the district court is affirmed with the following directions: That court is directed to issue the writ of habeas corpus unless within 90 days from the date of this judgment the Commonwealth has either instituted proceedings to retry the petitioner or applied for a writ of certiorari. If certiorari is sought and granted, the issuance of the writ of habeas corpus shall be stayed pending further order of the Supreme Court. If certiorari is sought and denied, the writ of habeas corpus shall issue unless the Commonwealth has instituted proceedings to retry the petitioner within 30 days after the date certiorari is denied. No Costs.

By the Court:

Clerk.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-1216

THEODORE RISTAINO, ET AL — Petitioner

vs

JAMES ROSS, JR. — Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, James Ross, Jr., who is now held at the Massachusetts Correctional Institution at Norfolk, asks leave to file the attached Brief In Opposition To Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit, and to proceed in forma pauperis pursuant to Rule 53.

The Respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

Michael G. West, J.D.
Not a member of the Bar of this Court
Counsel for Respondent Below
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Kamberg
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Hendel, P.C.
attorneys at law

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-1216

THEODORE RISTAINO, ET AL — Petitioner

vs

JAMES ROSS, JR. — Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, James Ross, Jr., being duly sworn according to law, depose and say, in support of my motion for leave to proceed in forma pauperis

1. I am the Respondent in the above-entitled case, and am presently incarcerated in the Massachusetts Correctional Institution, Norfolk.

2. Because of my property, I am unable to pay the costs of such cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. I have proceeded below in both the state trial and appellate Courts and both Federal Courts in forma pauperis.

6. The nature of said cause is briefly stated as follows:

I was found guilty of indictments charging me with armed robbery, assault with a dangerous weapon, and assault and battery with intent to murder in the Superior Court of the Commonwealth of Massachusetts on July 2, 1970, receiving concurrent terms of 18 to 30 years for armed robbery, six to 10 years for assault with a dangerous weapon, and 18 to 20 years for assault and battery with intent to murder. During the voir dire to the prospective jurors I proposed questions to the judge concerning racial prejudice to ask the prospective jurors in order to insure a fair and impartial trial guaranteed me by the Constitution of the United States. The judge refused to ask these questions. I raised this same issue on appeal and the Supreme Judicial Court held that the trial judge's refusal to ask these proposed questions did not deny me any protections guaranteed me by the United States Constitution. Both the United States District Court for the District of Massachusetts (decision not yet reported) and the United States Court of Appeals for the First Circuit, 508 F. 2d. 754 (1974) have held that failure of the trial judge to ask proposed specific questions to the prospective jurors denied me my Constitutional rights. I allege that the trial judge's failure to ask specific questions to the prospective jurors violated this Court's decisions in Aldridge v. United States, 283 U.S. 308 (1931) and Ham v. South Carolina, 409 U.S. 524 (1973).

me James Ross Jr
JAMES ROSS, JR.

Sworn and subscribed to before me under the pains and penalties of perjury this 7th day of April, 1975.

Subscribed and sworn to before me this 7th day of April 1975.
Commonwealth of Massachusetts, County of Norfolk SS.

Charles E Rose
Notary Public

Kamberg Berman & Hendel, P.C.
attorneys at law

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1216

APR 29 1975
OFFICE OF THE CLERK
SUPREME COURT, U.S.

THEODORE RISTAINO, ET AL, Petitioners

v.

JAMES ROSS, JR., Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR JAMES ROSS, JR. IN OPPOSITION

MICHAEL G. WEST, J.D.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1216

THEODORE RISTAINO, ET AL, Petitioner

v.

JAMES ROSS, JR., Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR JAMES ROSS, JR.
IN OPPOSITION

PRIOR PROCEEDINGS

ROSS was convicted by a trial jury in the Superior Court, Middlesex County, Massachusetts, and there is no opinion with respect to that conviction. The opinion of the Supreme Judicial Court of Massachusetts in Commonwealth v. Ross is reported in 1972

Mass. Adv. Sh. 873, 282 N.E. 2d 70. ROSS filed a timely petition to the United States Supreme Court, Misc. #72-5119, and on January 22, 1973, Petitioner's Motion to Proceed In Forma Pauperis and Petition for Writ of Certiorari were granted, the judgment below vacated and the case remanded for further consideration in light of Ham v. South Carolina, 409 U.S. 524; Ross v. Massachusetts, 410 U.S. 901 (1973). Subsequently, a second opinion was rendered affirming ROSS' conviction by the Supreme Judicial Court for the Commonwealth of Massachusetts and is reported in 1973 Mass. Adv. Sh. 839, 296 N.E. 2d 810, and is reprinted in App. A pp. 38-46. ROSS again filed a timely Petition for Writ of Certiorari to the United States Supreme Court, which petition was denied on December 3, 1973, with Mr. Justices Marshall, Douglas and Brennen dissenting and is reprinted in the App. A pp. 47-52 Ross v. Massachusetts, 414 U.S. 1080 (1974). ROSS then filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Massachusetts. On June 24, 1974, the Honorable Walter Jay Skinner, after a hearing, issued a memorandum and order stating that:

> "The writ of habeas corpus shall issue unless within 120 days from the date this Order becomes final the Commonwealth shall have instituted proceedings to retry the petitioner in accordance with principles stated above." Ross v. Ristaino (App. A pp. 15-17).

The Commonwealth then instituted an appeal of Judge Skinner's memorandum and order to the United States Court of Appeals for the First Circuit. On December 31, 1974 the Court of Appeals issued a decision affirming the granting of ROSS' Petition for Writ of Habeas Corpus and stated:

> "On these facts the District Court was not in error in concluding that '(t)he likelihood of infection of the verdict (by racial prejudice) was at least as great as it was in Ham.' In effect the Court held that a black defendant charged with a violent crime against a white security officer would be likely to be a special target of racial prejudice." Ristaino v. Ross, 508 F.2d 754, 756 (Petitioners App. A pp. 21-34, AT 25.

The Commonwealth then filed a Petition for Writ of Certiorari with this Court.

STATEMENT OF THE ISSUE

The sole issue before this Court is whether the United States Court of Appeals for the First Circuit erred in its application of Ham v. South Carolina, 409 U.S. 524 (1973) to the case at bar.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in part:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed..."

The Fourteenth Amendment to the United States Constitution provides in part:

> Section 1... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent, JAMES ROSS, JR., was convicted on three indictments (App. A pp. 7, 9, 11), charging him with armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder. As a result of these convictions, ROSS received terms of 18 to 30 years for armed robbery (App. A p. 9), 6 to 10 years for assault with a dangerous weapon (App. A p. 7), and 18 to 20 years for assault and battery with intent to murder (App. A p. 11), to be served concurrently at a Massachusetts Correctional Institution.

Before trial, and prior to the impanelling of the jury, each defense counsel submitted motions to the judge which proposed

questions to be asked to the prospective jurors concerning the issue of racial prejudice. (App. B p. 419; App. A pp. 53, 54, 57).

Among those questions submitted to the judge concerning racial prejudice were the following:

Submitted by Counsel for Respondent Ross.

"5. Are there any of you who believe that a white person is more likely to be telling the truth than a black person?" (App. A p. 53)

Submitted by Counsel for Co-defendant Roy Daniels.

"3. Do you believe that blacks have a greater propensity for violent or militant behavior than whites?

"4. Over the past years have you noticed a change in the number of crimes being committed in this city?

"6. Has it disturbed you?

"7. Do you feel this increase is due primarily to blacks in the city?

"8. Have you noticed an increased number of blacks and Puerto Ricans coming into your neighborhood?

"9. Have you been disturbed by the changes in your neighborhood?

"10. Have you thought of moving out of it?" (App. A p. 58)

Submitted by Counsel for Co-defendant James Williams.

"10. Would the fact that the defendant is black make it more difficult for you to render a verdict in his favor than if he were white?

"11. If it develops in this case that testimony of black witnesses contradicts the testimony of white witnesses, other things being equal, would you give the testimony of black witnesses and white witnesses equal credit?

"12. Do you have any feelings of prejudices against organizations which support civil rights for members of the black race, such as the National Association for the Advancement of Colored People (NAACP) or the Congress for Racial Equality (CORE) or the Black Panther Party?

"13. Have demonstrations and other activities by blacks in various parts of the United States over the past few years left you with a feeling of hostility toward blacks?

"14. Have you felt in your own mind that black leaders are 'going too far' in their struggle for equal rights? (App. A p. 55)

"15. Have you had an experience involving a black person which left you with a feeling of prejudice concerning members of the black race?

"16. Would the fact that the defendant is a member of a minority group make it more difficult for you to consider the facts objectively and render a verdict in his favor than if he were not a member of such group?

"17. Are there any members of this jury who possess any prejudices with respect to the nationality of any one of the defendants which would prevent you from deciding this case solely on the evidence produced at the trial?

"18. Do you have any feelings either for or against persons of the black race who wear the Afro style haircut and long sideburns?

"19. Are there any members of this jury who possess any prejudice with respect to black people who are involved in causes seeking liberation and justice for black people which would prevent you

from deciding this case solely on the evidence produced at the trial?" (App. A p. 56)

These motions were made and denied (App. A pp. 53, 54, 57). The reason for the judge's refusal to ask any of the proposed questions is contained in the following colloquy:

> THE COURT: "All right. I am going to approach it, as I have said, with all due respect to the problems, and they are important problems which you gentlemen have raised with these several questions which you have asked the Court to put in addition to the usual statutory inquiry, and without going into details as to my reasons, I feel that no purpose would be accomplished by asking such questions in this instance.
>
> There are a number of reasons why I take that position, but they are sound reasons, and the reason I asked you in is that I thought from something Mr. Donnelly said, he might have wanted on the record something which was peculiar to this case, or peculiar to the circumstances which we are operating under here which perhaps he didn't want to say in open court.
>
> Is there anything peculiar about it, Mr. Donnelly?
>
> MR. DONNELLY:[1] No, just the fact that the victim is white, and the defendants are black.
>
> THE COURT: This, unfortunately, is a problem with us, and all we can hope and pray for is that the jurors and all of them take their oaths seriously and understand the spirit of their oath and understand the spirit of what the Court says to them--- this Judge anyway -- and I am sure all Judges of this Court -- would take the time to impress upon them before, during and after the trial, and before their verdict, that their oath means just what it says, that they are to decide the case on the evidence, with no extraneous considerations.
>
> I believe that that is the best that can be done with respect to the problems which -- as I said, I regard as extremely important, but at the same time, my attitude --
>
> MR. DONNELLY: There is only one thing. The only reference I

---

[1]Mr. Donnelly was counsel for Roy Daniels; Mr. Owens was counsel for James Williams and Mr. Newman was counsel for James Ross, Jr.

would make to the facts in this case -- the victim being white, and that he was a security guard in uniform and acting as a policeman.

MR. OWENS: In behalf of James Williams, I have various questions before the Court right now, as to impartiality, and I understand the Court's position, but I would request the Court to just make general inquiry of the entire panel because whenever you have a situation involving black and white, by way of witnesses, a black witness testifying, and black, as to whether or not these jurors are impartial --

THE COURT: Let me say, again with the greatest respect for the problem, which is an acute problem, and always will be an acute problem in the courtroom and in the trial of a case involving possible racial prejudice, but one of the things that I say, and it is not the complete reasoning process that I apply to it in terms of orderly and fair administration of the Court, but one of the things I say is that I would be simply astonished if I ever asked a juror, or a group of jurors, or ever heard a lawyer ask a group of jurors if they are white, 'Are you biased against black,' if they are white, or if they are black, 'are you biased against white.' I would be simply astonished if I had an affirmative answer. The man who has the disease of bias would be the last one that would admit it.

MR. OWENS: Your Honor, just recently I tried that civil rights case before Judge Julian which lasted four weeks, and some of the same questions we asked the entire panel, and I think 20 raised their hands when the Judge asked them certain questions, if they were biased or prejudiced.

THE COURT: I am astonished at that. It is contrary to all of the experience that I have had.

MR. DONNELLY: I tend to agree with you that people like to be good, and racism is bad, but if you ask people in the community, 'Can you be impartial?' they will say they can be. The thrust of these questions is designed to help the jurors as well as the Court to bring out within themselves the fact that they might not have considered it themselves. (App. B pp. 419-423).

Instead of asking any of the proposed questions or any other question of the court's choosing as to racial prejudice the court addressed the following questions to the jurors as required

by Massachusetts General Laws, Chapter 234, Section 28:

> "If any of you are related to the defendant or the victim?
>
> "If you have any interest in this case?
>
> "If you have expressed or formed an opinion or are sensible of any bias or prejudice?" (App. B. pp. 431, 432).

In addition, the court asked two additional questions; one dealing with whether the jurors or their relations had done police work[2] and the other dealing with whether the jurors would be seriously inconvenienced if they were sequestered for the duration of the trial. (App. B p. 434).

Prospective jurors were excused by the court because of their answers to these questions.[3] At the close of the impanelling of the jury, ROSS, as well as the other two co-defendants, had exhausted their peremptory challenges whereas the Commonwealth had

---

[2]Question: "Are you presently, or have you in the past worked for a police department or a District Attorney's office, or do you have any relative or relatives who is or was engaged in such work?" (App. B p. 423).

[3]Seventeen jurors were excused; two because of admitted prejudice (App. B pp. 440-441, 464), and fifteen because they had already formed an opinion (App. B pp. 437, 470, 471, 480, 499, 525, 538, 539, 540, 542, 501, 503, 504, 519, 520, 521).

thirty-one peremptory challenges left. (App. B p. 547, Commonwealth v. Ross, App. A pp. 38-46 AT 44N.9).

Moreover, prior to the time the prospective jurors were asked the above-mentioned questions the trial judge discussed with each prospective jury panel their obligation to render a fair and impartial verdict based only on the evidence. However, not once during the trial judge's lengthy soliloquy to each panel of prospective jurors did he directly confront the issue of racial prejudice. Rather, he spoke in general terms appealing to the prospective jurors' "intellect and conscience" (App. B p. 433). A representative soliloquy by the trial judge to the juror panel is contained in App. B pp. 429-435.

ROSS' final deliberating jury contained ten (10) whites and two (2) blacks (App. B p. 562, 1372. Commonwealth v. Ross, (App. A pp. 38-46 AT 44). On appeal, ROSS assigned as error the refusal of the trial judge to examine the jurors with respect to racial prejudice and argued that such refusal violated his right to a fair and impartial jury. The Supreme Judicial Court affirmed ROSS' conviction. Petitioner then filed a timely Petition for a Writ of Certiorari to this Court which was granted, judgment vacated and case remanded for further consideration in light of Ham v. South Carolina. After rehearing the Supreme Judicial Court again affirmed ROSS' conviction. ROSS again filed a timely Petition for a Writ of Certiorari to the United States Supreme Court which petition was denied on December 3, 1973, in which

three Justices in a lengthy opinion dissented. (App. A pp. 47-52). ROSS then filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Massachusetts which petition was conditionally granted on June 24, 1974, (App. A. pp. 15-18). An appeal by the Commonwealth of Massachusetts was taken from the conditional granting of ROSS' Petition for Writ of Habeas Corpus to the United States Court of Appeals for the First Circuit which affirmed the granting of ROSS' Petition. Ristaino v. Ross, 508 F.2d 754 (Petitioners App. A pp. 21-34). The Commonwealth then filed a Petition for Writ of Certiorari to this Court.

ARGUMENT

THE JUDGMENT OF THE COURT BELOW UPHOLDING RESPONDENT ROSS' RIGHT TO HAVE THE TRIAL JUDGE EXAMINE PROSPECTIVE JURORS WITH RESPECT TO RACIAL PREJUDICE IS IN CONFORMITY WITH THIS COURT'S DECISION IN HAM V. SOUTH CAROLINA, 409 U.S. 524 (1973).

On December 31, 1974, the United States Court of Appeals for the First Circuit affirmed a decision of the United States District Court for the District of Massachusetts granting ROSS' Petition for Writ of Habeas Corpus and declaring that the trial judges failure to specifically inquire of the prospective jurors as to racial prejudice rises to a level of a constitutional violation requiring ROSS' release or retrial. The First Circuit appears to limit its decision to situations which involve a black criminal defendant charged with a violent crime. They state:

> "On these facts the district court was not in error in concluding that '(t)he likelihood of infection of the verdict (by racial prejudice) was at least as great as it was in Ham.' In effect the court held that a black defendant charged with violent crimes would be likely to be a special target of racial prejudice." (Petitioner's App. A pp. 21-34 AT 25).

On June 24, 1974, the Honorable Walter Jay Skinner, Judge for the United States District Court for the District of Massachusetts, issued a memorandum and order granting ROSS' Petition for Writ of Habeas Corpus based upon the fact that the trial judge erred in not specifically calling to the attention of the prospective jurors the issue of racial prejudice (App. A pp. 15-18 AT 17). Judge Skinner's ruling was made despite the otherwise exemplary conduct of the trial judge and despite the respect which the federal courts owe to decisions of the highest court of a state. He said with regard to Ham v. South Carolina that its true significance is to extend the rule in Aldridge to state court trials (App. A pp. 15-18 AT 16). However, in addition to Judge Skinner concurring with Justices Marshall, Douglas and Brennen that the facts in Ross are "strikingly similar" to those of Aldridge v. United States, 283 U.S. 308 (1931) he said in rendering his opinion in favor of ROSS that:

> "The mandate of Ham is so clear, however, and the rule announced is so fundamental that I have no choice but to enter the following order." (App. A pp. 15-18 AT 17).

On January 17, 1973, this Court decided the case of Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed. 2d 46 (1973). This Court held pursuant to the Due Process Clause of the Fourteenth Amendment, that a black defendant in a state court criminal proceeding is entitled to have the trial judge make inquiry of the prospective jurors as to racial prejudice. Not to do so is a reversible error. 409 U.S. 524, 93 S.Ct. 848, 850 35 L.Ed. 2d 46 (1973).

The Supreme Judicial Court for the Commonwealth of Massachusetts in its decision in Commonwealth v. Ross, 1973 Adv. Sh. 839, 296 N.E. 2d. 810 upheld the trial judge's refusal to ask the following question to the prospective jurors which was submitted by counsel for Respondent ROSS:

> "Are there any of you who believe that a white person is more likely to be telling the truth than a black person?"

The Supreme Judicial Court upheld the trial judge's refusal since it believed that Ham was to be limited to its facts and that unless ROSS could show that he was a "special target for racial prejudice," the trial judge was not constitutionally required by Ham to specifically interrogate the prospective jurors as to racial prejudice.[4]

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[4] 1973 Adv. Sh. 839, ___, 296 N.E. 2d 810, 816.

It is Respondent ROSS' assertion that the Supreme Judicial Court erred in its interpretation of the decision in Ham v. South Carolina as well as its affirmation of his conviction and that this Court should either deny Petitioner's Petition for Writ of Certiorari or grant its Petition and summarily affirm the decision of the United States Court of Appeals for the First Circuit in this case.

The United States Supreme Court in its decision in Ham v. South Carolina, supra, stated that the constitutional stature of the inquiry into racial prejudice is derived from:

> "...the firmly established precedent of Aldridge and the numerous state cases upon which it relied and from the principal purpose as well as from the language of those who adopted the Fourteenth Amendment."[5]

The opinion, written by Mr. Justice Rehnquest, for the unanimous Court in Ham clearly indicates that the rationale for its decision was based upon the purpose and foundation of the Fourteenth Amendment which was to stop invidious discrimination based on racial prejudice.[6] Because of the historical basis of

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[5] 409 U.S. 524, ___, 93 S.Ct. 848, 851, 35 L.Ed. 46, ___. See also Ross v. Ristaino et al (App. A pp. 15-18 AT 16).

[6] ID at 850.

the Fourteenth Amendment to eliminate racial prejudice this Court has recognized that racial prejudice is a paramount factor to be taken into account in criminal proceedings. Nothing in the Ham opinion or the opinions of the district and circuit courts and nothing in the Fourteenth Amendment supports the conclusion that protection is to be limited to "special targets for racial prejudice." The report of the National Advisory Commission on Civil Disorders (1968) commonly referred to as the Kerner Commission Report recognizes the prevalence of racism in our society when it states:

> "Race prejudice has shaped our history decisively in the past; it now threatens to do so again. White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II." (Page 91)

No one can doubt the validity of this statement. In fact, Mr. Justice Marshall, with whom Mr. Justice Douglas and Mr. Justice Brennen joined, dissenting in the denial of the Second Petition of Certiorari filed by ROSS states:

> "Finally, to say that petitioner is not a potential target of racial prejudice would be to ignore as judge what we must all know as men. That petitioner was tried in Boston, Massachusetts, while Gene Ham was tried in Florence, South

> Carolina, is of no consequence. Racial prejudice is a cultural malady that has shaped our history as a nation. It is a cancer of the mind and spirit which breeds as prolifically in the industrial cities of the North as in the rural towns of the South." (App. A pp. 47-52 AT 52).

ROSS asserts that to limit the voir dire as to racial prejudice only to "special circumstances"[7] where the defendant is found to be a "special target" for racial prejudice is not to face the reality of our times and in addition to place an undue burden on the defendant to show that he is such a "special target."

As previously mentioned, the decision in Ham relied in part on "the firmly established precedent of Aldridge and the numerous state cases upon which it relied". Aldridge v. United States, 238 U.S. 308, concerned a Negro criminal defendant who was alleged to have murdered a white policeman. Aldridge did not deal with a black defendant who was a "special target" for racial prejudice and no other factors were shown to be present when the United States Supreme Court reversed his conviction. In fact, Mr. Justice Marshall states:

> "The Aldridge Court was not concerned with whether petitioner was unpopular in the community,

[7] 1973 Adv. Sh. 839, 296 N.E. 2d 810, 816.

> a special target of prejudice--but rather with the potential racial 'bias of the particular jurors who are to try the accused.' 283 U.S., at 314. The Court did not rely on any particular circumstances to justify its requirements other than the fact that 'the possibility of prejudice (against Negroes) is (not) so remote as to justify the risk in forbidding the inquiry.' Ibid. Nor did the Court purport to limit its holding to any region because the 'question is not . . . the dominant sentiment of the community . . . ' Ibid. 'In Ham, this Court reaffirmed its commitment to the holding of Aldridge and clarified its constitutional underpinnings. The Court emphasized the compelling nature of an inquiry into racial prejudice--the principal target of the Fourteenth Amendment.'" (App. A pp. 47-52 AT 50).

In Aldridge numerous cases are cited which this Court in Ham cites with approval in which there were no special circumstances, other than the fact that the defendant was a Negro, to require reversal of the defendant's conviction due to the failure of the trial judge to inquire about any racial prejudice the prospective jurors might entertain.

Pinder v. State, 27 Fla. 370, 8 So. 837 (1891) was a case where the defendant, a Negro, was accused of murder. The lower

Circuit Court refused to propound the following question to the prospective jurors:

> "Could you give the defendant, who is a negro, as fair and impartial a trial as you could a white man, and give him the same advantage and protection as you would a white man upon the same evidence?"

The Supreme Court of Florida held it was reversal error not to ask the above question. This case presents no special circumstances other than the fact that the defendant was a Negro.

In Hill v. State, 112 Miss. 260, 72 So. 1003 (1916) where the accused, a Negro, was charged with murder of another Negro, all witnesses except one was Negro. Counsel for the defendant propounded the following question to a prospective juror which the lower Court held to be incompetent:

> "Mr. Dillard, have you got any prejudice against the negro, as a negro, that would induce you to return a verdict on less slighter evidence than you would return a verdict of guilty against a white man under the same circumstances?"

The Supreme Court of Mississippi reversed the appellant's conviction and stated:

> "...how else could appellant have guarded against race prejudice figuring in the determination

> of his trial than by subjecting the jurors on their voir dire examination to a line of questioning such as was presented to the Court in this instance. It is only by asking questions of the nature of the above question that it is possible for counsel to elicit from the venireman whether or not there exists in his breast race prejudice, perhaps calculated to do the defendant irreparable injury in the trial of his case", 112 Miss. 260, 265.

In State v. McAfee, 64 N.C. 339 (1869) the Supreme Court of North Carolina reversed the rape conviction of a colored man because of the refusal of the trial judge to ask the prospective jurors if:

> "...he believed he could, as a juror, do equal and impartial justice between the State and a colored man".

No special circumstances were present in this case to influence the North Carolina Court to reverse Mr. McAfee's conviction other than the fact that the defendant was a colored man.

It is clear from this Court's decisions in Aldridge and Ham and the numerous cases upon which it relied in making its decision, that the "special target" doctrine advanced by the

Supreme Judicial Court for the Commonwealth of Massachusetts, in the case at bar, finds no support. In fact Mr. Justice Marshall speaking for himself and Mr. Justice Douglas and Mr. Justice Brennen, dissenting from the Court's denial of ROSS' Petition for Certiorari states in regard to the Supreme Judicial Court's decision that Ham was to be limited to those defendants who were a "special target for racial prejudice" that:

> "This distinction is supported by neither logic or precedent." (App. A pp. 47-53 AT 49).

This Court in Ham has stated that in addition to the general questions required by statute to be put to the prospective jurors an additional question or questions must be put to the veniremen,

> "sufficient to focus the attention of prospective jurors to any racial prejudice they might entertain."[8]

Respondent ROSS asserts that the trial judge in the case at bar did not "focus the attention" of the veniremen as to the issue of racial prejudice. ROSS admits the trial judge was concerned about the issue of racial prejudice and regarded it as an important one. Petitioner further admits that the trial judge did speak at length to each panel of prospective jurors about

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[8]409 U.S. 524, ___, 93 S.Ct. 848, 35 L.Ed. 2d 46, ___ (1973).

their duty and obligation to render a fair and impartial verdict. (App. B pp. 429-435) However, not once during the trial judge's soliloquy to the veniremen did he directly confront the issue of racial prejudice.

It is ROSS' contention that the only way to "focus the attention of the prospective jurors as to any racial prejudice they might entertain" is to ask specific questions regarding racial prejudice. The First Circuit, in the case at bar, supports ROSS' assertion. (Petitioner's App. A pp. 21-34 AT 26). Additionally, Judge Skinner of the United States District Court for the District of Massachusetts recognized this fact when in his opinion in Ross he quotes from the case of People v. Reyes., 5 Cal. 347, 349 which is cited by Chief Justice Hughes in Aldridge and concludes:

> "As the juror best knows the condition of his own mind, no satisfactory conclusion can be arrived at, without resort to himself. Applying this test then, how is it possible to ascertain whether he is prejudiced or not unless questions similar to the foregoing are propounded to him." (App. A pp. 15-18 AT 17).

Moreover, the Seventh Circuit in United States v. Dellinger, 472 F.2d 340, 367 (1972) spoke to this point by stating:

> "The government's position must rest upon an assumption that a general question to the group whether there is any reason they could not be fair and impartial can be relied on to produce a disclosure of any disqualifying state of mind. We do not believe that a prospective juror is so alert to his own prejudices."

It is the essence of fundamental fairness and right to an impartial jury which has led this Court to pronounce that it is imperative to allow the specific question regarding racial prejudice or bias to be asked on voir dire examination.[9]

This Court in Swain v. Alabama notes that the influence of race on jurors is widely explored during voir dire and "that the fairness of trial by jury requires no less." 380 U.S. 202 AT 221 (1965).

> "Merely going through the form of obtaining juror's assurances of impartiality is insufficient . . . (w)hether a juror can render a verdict based solely on evidence adduced in the courtroom should

[9]Aldridge v. United States, 283 U.S. 308 (1931); Swain v. Alabama, 380 U.S. 202 (1965); Dennis V. United States, 339 U.S. 162 (1950).

> not be adjudged on that juror's own assessment of self-righteousness without something more."
> (Emphasis in original.)[10]

Calling for purely subjective responses to general questions is ineffective to test impartiality, and "the defendant in a criminal case has the 'right to probe for the hidden prejudices of jurors.'"[11]

However, the trial judge in the instant case instead of asking any of the defendants' proposed questions as to racial prejudice inquired in a general manner as to bias and prejudice, appealing solely to the jurors' "intellect and conscience" (App. B pp. 431, 433-434). It is obvious that the questions actually asked by the court were ineffective in uncovering the possibility of racial prejudice. In fact, of all the prospective jurors questioned only two were excused because of admitted prejudice (App. B pp. 440-441, 464).

Federal Courts have consistently held that a criminal defendant has a right to examine jurors specifically with respect

[10]Silverthorne v. United States, 400 F. 2d 627, 638-639 (9th Cir. 1968); United States v. Carter, 440 F. 2d 1132 (6th Cir. 1971).

[11]Silverthorne v. United States ID, at 640; See ABA Project on Standards For Criminal Justice, Fair Trial and Free Press, §§2.3, 126-127 (approved draft 1968); See also W. Forsyth, Trial By Jury 175 (1852); Devlin, Trial By Jury 30-31 (1956). Note, Community Hostility and The Right to Impartial Jury, 60 Colum. L. Rev. 349, 354 (1960).

to racial prejudice,[12] and such questions have been widely approved by state courts.[13]

THERE IS NO IRRECONCILABLE CONFLICT BETWEEN THE FEDERAL CIRCUITS SO AS TO REQUIRE THE GRANTING OF THIS WRIT

Since Ham was decided on January 17, 1973, all Courts[14] save three[15] have held that failure to propound questions to

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[12]United States v. Carter, 440 F. 2d 1132 (6th Cir. 1971); United States v. Gore, 435 F. 2d 1110 (4th Cir. 1970); King v. United States, 362 F. 2d 968 (D.C. Cir. 1966); Frasier v. United States, 267 F. 2d 62 (1st Cir. 1959); Smith v. United States, 262 F. 2d 50 (4th Cir. 1959); United States v. Dennis, 183 F. 2d 201, 227, n. 35 (2d Cir.), aff'd 341 U.S. 494 (1951); United States v. Dellinger, 342, F. 2d 340 (7th Cir. 1972).

[13]Gholston v. State, 221 Ala. 556, 130 So. 69 (1930); State v. Higgs, 143 Conn. 138, 120 A 2d 152 (1956); Pinder v. State, 27, Fla. 370, 8 So. 837 (1891); Herndon v. State, 178 Ga. 832, 174 S.E. 597 (1934); State v. Jones, 175 La. 1014, 144 So. 899 (1932); Giles v. State, 229 Md. 370, 183 A. 2d 359 (1962); Owens v. State, 177 Miss. 488, 171 So. 345 (1930); State v. Pyle, 343 Mo. 876, 123 S.W. 2d 166 (1938); Johnson v. State, 88 Neb. 565, 130 N.W. 282.

[14]See Ristaino v. Ross, 508 F. 2d 754 (1st Cir. 1974); United States v. Robinson, 485 F 2d 1157 (3rd Cir. 1973); Featherston v. United States, 491 F. 2d 96 (5th Cir. 1974); United States v. Ross, 477 F. 2d 551 (6th Cir. 1973); United States v. Power, 482 F. 2d 941 (8th Cir. 1973); United States v. Booker, 480 F. 2d. 1310 (7th Cir. 1973); United States v. Robinson, et al, 495 F. 2d 376, AT 381 (D.C. Cir. 1973).

[15]See United States v. Walker, 491 F. 2d 236 (9th Cir. 1974), cert. den. 416 U.S. 990 (1974) discussed in detail infra; Commonwealth v. Brown, 228 Pa. Super. 166, 323 A. 2d 281 (1974); Commonwealth v. Lumley, 1975 Adv. Sh. 751 (Supreme Judicial Court, Massachusetts, April 7, 1975) in which the Massachusetts Court states:

> "We refuse to follow decision of First Circuit which appears to hold that Ham v. South Carolina, 409 U.S. 521, requires such voir dire in all cases in which a defendant is charged with a violent crime against a white victim."

prospective jurors as to racial prejudice, when requested to do so by a black criminal defendant, is a violation of constitutional dimensions. Of these three courts only one United States Court of Appeals has held that Ham is to be limited to its facts and requires a prior showing that the defendant is a "special target for racial prejudice" before a constitutional right is involved. However, this case, United States v. Walker, 491 F.2d 236 (9th Cir. 1974) cert. den. 416 U.S. 990 (1974) is distinguishable from the case at bar in several material respects:

> FIRST, Walker dealt with the crime of uttering a forged check whereas Ross dealt with the assault by a black man against a white quasi police officer which fact ROSS asserts makes his case, per se, one with racial overtones. It is important to note that the First Circuit in the case at bar limited its holding to violent crimes and did not render any opinion to as crimes such as that involved in Walker.[16]
>
> SECOND, the Court in Walker states that its facts

Continued from previous page

Additionally, they state:

> "(W)e do not believe that the due process clause mandates such examination in every case in which there is a black defendant. We adhere to our prior holdings...that the defendant must be a special target for prejudice before the constitutional guarantees are invoked." (3 Massachusetts Lawyers Weekly 405 April 7, 1975).

are distinguishable from both Aldridge and Ham, whereas the facts in Ross are "strikingly similar" to those in Aldridge (See App. A pp. 47-52 AT 52 and App. A pp. 15-18 AT 17).

THIRD, in reaching its conclusion the Walker Court relied heavily on the Supreme Judicial Court's decision in Commonwealth v. Ross, 296 N.E. 2d. 810 (1973), whereas that decision has been overruled by both the Honorable Walter Jay Skinner (App. A pp. 15-18) and the United States Court of Appeals for the First Circuit (Petitioners App. A pp. 21-34) which decisions the Walker Court did not have the benefit of in making its decision.

FOURTH, in Walker the Court agrees that asking prospective jurors questions as to racial prejudice would be preferable but holds that asking these questions did not rise to the level of an abuse of discretion particularly "in view of the fact that no objection was made to the Court's failure to ask the questions" (491 F.2d. 236, 239). Whereas ROSS strenuously objected to the trial judge's failure to ask his proposed

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[16]Ristaino v. Ross, 508 F. 2d 754, AT 756 (1st Cir. 1974).

questions or those of his co-defendants and the trial judge noted ROSS' exception to his failure to do so.

The case of United States v. Walker is clearly distinguishable from Ross and should not be controlling on this Court's decision. In fact, Respondent asserts that Walker is consistent with First Circuit's decision and, therefore, no conflict exists between any of the Circuit Courts of Appeals which have thus far decided this issue.

FAILURE OF THE TRIAL JUDGE TO EXAMINE THE PROSPECTIVE JURORS REGARDING RACIAL PREJUDICE IS REVERSIBLE ERROR WITHOUT THE NEED TO SHOW ACTUAL PREJUDICE.

This Court in the case of Peters v. Kiff, 407 U.S. 501 (1972) has expressed in clear terms that:

> "a fair trial in a fair tribunal is a basic requirement of due process". (citing In Re Murchison). (AT 501)

While the Kiff decision dealt primarily with the systematic exclusion of blacks from the jury, and raised issues of due process and equal protection, the underlying implication and major thrust of the resolution of the problem was that the right to trial by an impartial jury requires that the jury be selected and comprised of jurors who are capable of rendering a verdict based on the evidence, unfettered by any possible prejudice or bias.

This Court emphasized on page 501 that:

> "Long before this court held that the Constitution imposes the requirement of jury trial on the states, it is well established that the due process clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law." and also that:
>
> "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." (AT 502)

There is no doubt that the possibility of jurors being racially prejudiced existed and therefore would play a significant role in the disposition of the case at bar.

In the case of United States v. Carter,[17] 440 F.2d 1132 (1971), the Sixth Circuit dealt with the exact issue as was presented in Aldridge and in the present case. In holding that the trial judge committed reversible error by refusing to permit Appellant's counsel to inquire on voir dire examination whether any of the prospective jurors were prejudiced against black

[17] In United States v. Carter 10 of 12 jurors were white as in the present case.

people, the court referred to the language of Aldridge and stated:

> "The argument is advanced on behalf of the government that it would be detrimental to the administration of law in the courts of the U.S. to allow questions to jurors as to racial or religious prejudices. We think it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualifications were barred. No surer way could be devised to bring the process of justice into disrepute." (at 1133 citing Aldridge v. United States 283 U.S. 308 AT 313)

It is up to the trial judge to assure that no prejudice has been fostered. In order to assure the impartiality of the jury, it has been widely held that the trial judge must allow probing questions to jurors on voir dire as to the harboring of a racial bias. The main point is that "the denial or impairment of the right to challenge the jury has been described as 'reversible error without a showing of prejudice'"[18] (emphasis supplied). It should be noted that cases which have construed this particular

[18] Swain v. Alabama, 380 U.S. 202, 219 (1965). See also U.S. v. Booker, 480 F. 2d 1310, (7th Cir. 1973).

issue have consistently held that such error is reversible, for the question is one of denying the petitioner his constitutionally guaranteed right to an impartial jury.[19] Furthermore, in the Kiff case this Court states:

> "Moreover, even if there is no showing of actual bias in the tribunal, this court has held that due process is denied by circumstances that create the likelihood or the appearance of bias." (AT 502)

In essence, it has been impressed upon our judicial system that "circumstances that create the likelihood or appearance of bias" must be dealt with in such a manner as to give assurances to

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[19] U.S. v. Booker 480 F. 2d 1310, (7th Cir. 1973); United States v. Dellinger, 342 F. 2d 340 (7th Cir. 1972).

United States v. Dennis, 183 F. 2d 201, 227 N. 35 (2nd Cir.) aff'd. 341 U.S. 494 (1951); Bailey v. United States, 53 F. 2d 982 (5th Cir. 1931); Smith v. United States, 262 F. 2d 50 (4th Cir. 1931); King v. United States, 362 F. 2d 966 (1966); Silverthorne v. United States, 400 F. 2d 627 (9th Cir. 1968); United States v. Carter, 440 F. 2d 1132 (6th Cir. 1971); United States v. Gore, 435 F. 2d 1110 (4th Cir. 1970); Frasier v. United States, 267 F. 2d 62 (1st Cir. 1959); Kiernan v. Van Schaik, 347 F. 2d 775 (3rd Cir.); Spells v. United States, 263 F. 2d 609 (5th Cir.); Brown v. United States, 338 F. 2d 543 (1964); Gholston v. State, 221 Ala 556, 130 So. 69 (1930); State v. Higgs, 143 Conn. 138, 120 A. 2d 152 (1956); Pinder v. State, 27 Fla. 370, 8 So. 837 (1898); Herndon v. State, 178 Ga. 832, 174 S.E. 597 (1934); State v. Jones, 175 La. 1014, 144 So. 899 (1932); Giles v. State, 229 Md. 370, 183 A. 2d 359 (1962); Owens v. State, 177 Miss. 488, 171 So. 345 (1930); State v. Pyle, 343 Mo. 876, 123 S.W. 2d 166 (1938); Johnson v. State, 88 Neb. 565, 130 N.W. 282 (1911); People v. Decker, 157 N.Y. 186, 51 N.E. 1018 (1898); State v. McAfee, 64 N.C. 339 (1870); Fendrick v. State, 39 Tex. Cr. 147, 45 S.W. 589 (1898).

a criminal defendant placed in this precarious position that due process of law via his right to an impartial jury will be preserved at every stage of the proceedings. The impartiality and integrity of the jury system, the cornerstone of our judicial system, and the defendant's last sanctuary has been subverted in the case at bar.

THE FIRST CIRCUIT IN ROSS DID NOT ERR IN HOLDING THAT HAM V. SOUTH CAROLINA, 409 U.S. 524 (1973) IS TO BE GIVEN RETROACTIVE EFFECT.

The First Circuit Court of Appeals in deciding Ristaino v. Ross stated:

> "Our dissenting brother suggests that the rule of Ham should only apply to cases brought to trial after the date Ham was decided. However, we do not feel the Writ should be denied on the ground that Ham should not be given retroactive application. The Supreme Court implicitly decided that Ham applied to this case when it summarily vacated the judgment of the Supreme Judicial Court of Massachusetts and remanded the case to that Court for reconsideration in light of Ham. See Ross v. Massachusetts, 410 U.S. 901 (1973)."

The Commonwealth in their Petition for Writ of Certiorari at page 6 suggests that there is no support for this inference

drawn by the First Circuit. Respondent disagrees. Ample support for this inference is contained in the case of Fuller v. Alaska, 393 U.S. 80 (1968). Fuller v. Alaska, supra, is similar to the case at bar in that decisions in both cases were rendered by this Court shortly after reversing a criminal conviction and which decisions formulated a new or revised rule of law heretofore not enunciated by this Court. Just prior to deciding the Fuller case this Court had decided Lee v. Florida, 392 U.S. 378 (1968) and held that evidence which was violative of Section 605 of the Federal Communications Act was not admissible in state criminal trials. After deciding Lee v. Florida, supra, this Court granted Petitioner's Petition for Writ of Certiorari and affirmed by stating:

> In Lee v. Florida, 392 U.S. 378, we overruled Schwartz v. Texas and held that evidence violative of §§605 is not admissible in state criminal trials. The decision of the Alaska Supreme Court cannot stand, therefore, if Lee is to be applied retroactively. We hold, however, that the exclusionary rule of Lee is to be given prospective application, and, accordingly, we affirm.
>
> Prospective application of Lee is supported by all of the considerations outlined in Stovall v. Denno, 388 U.S. 293, 297.[1] The purpose of Lee was in no sense to "enhance the reliability of the fact-finding process at trial." Johnson v. New Jersey, 384 U.S. 719, 729. Like Mapp v. Ohio, 367 U.S. 643, Lee was designed to enforce the federal law.[2] Linkletter v. Walker, 381 U.S. 618, 639. And evidence seized in violation of the federal statute is no less relevant and reliable than that seized in violation of the Fourth Amendment to the Constitution. Moreover, the States have justifiably relied upon the explicit holding of Schwartz that such evidence was admissible.
>
> Retroactive application of Lee would overturn

> every state conviction obtained in good-faith reliance on Schwartz. Since this result is not required by the principle upon which Lee was decided, or necessary to accomplish its purpose, we hold that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in Lee.
>
> The petition for a writ of certiorari is granted, and the judgment of the Supreme Court of Alaska is affirmed. 393 U.S. 80 AT 80-81.

Certainly, this Court had every opportunity when ROSS first presented his Petition for Writ of Certiorari to grant his Petition and affirm his conviction and stating that Ham v. South Carolina, supra, was not to be given retrospective application. Therefore, this Court's decision to grant ROSS' first Petition and remand his case to the Supreme Judicial Court for Massachusetts implicity determined that Ham was to be applied retroactively to the case at bar. Furthermore, although the issue of the retroactive[20] application of Ham was not mentioned in either of the Supreme Judicial Court decisions in Ross it was briefed and argued in a case[21] argued and decided on the same day as Ross and

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[20]It is interesting to note that in the five (5) appellate hearings to date held in the case at bar, since Ham was decided, not one line of any brief prepared by the Commonwealth refers to or contests the retroactive application of Ham. The first indication Respondent had that the Commonwealth was raising the issue of Ham's retrospective application was at the oral argument before the United States Court of Appeals for the First Circuit.

[21]See Commonwealth v. Ryles, 296 N.E. 2d 816 (1973) Petition for Habeas Corpus granted subnom Ryles v. Ristaino, __ F. Supp. __ (D. Mass. 1975) (citing Ristaino v. Ross, 508 F. 2d 754 (1st Cir. 1974).

presenting the identical issue. Respondent asserts that the Supreme Judicial Court implicitly decided that Ham was to be given retroactive effect when it rendered its decisions in both the Ross and Ryles[22] cases.

Furthermore, Petitioner in its Petition, page 7, urges this Court to follow its decision in Taylor v. Louisiana and for the same reasons not hold Ham to be retroactive. A distinction can be drawn between the decisions of Taylor v. Louisiana ___ U.S. ___, 43 L.W. 4167 (1975) and Ham v. South Carolina in regard to whether Ham should be given retrospective application. Taylor v. Louisiana, supra, when decided on January 21, 1975 announced a new rule of law, heretofore unstated, that the exclusion of women from jury service denied a defendant's Sixth and Fourteenth Amendment right to an impartial jury trial. Ham, on the other hand, did not announce a new rule of law but rather simply clarified the basis for this Court's decision in Aldridge. Moreover, since Ham, and unlike Taylor, numerous state and federal courts have given ample warnings of the constitutional requirements of asking prospective jurors specific questions as to racial prejudice. The Commonwealth of Massachusetts was not caught off guard by this Court's decision in Ham but has been reluctant to follow its teachings and has shown contempt for this Court's decision in Ham and the decisions of the United States District Court for the District of

[22] ID.

Massachusetts and the United States Court of Appeals for the First Circuit in the case at bar. See Commonwealth v. Lumley, 1975 Adv. Sh. ___, (Supreme Judicial Court, Massachusetts).

Lastly, the Petitioner asserts at p. 9 of its Petition that failure to grant its Petition would "require reversal of every case in the Commonwealth involving a defendant who was a member of a racial minority." Respondent asserts that your Petitioner misreads the First Circuit's decision in Ross.

FIRST, the First Circuit decision does not hold Ham to be "fully retroactive" but only to apply to Ross. It is certainly premature, without further clarification from the First Circuit, to extend its decision in Ross to "all defendants who (are) member(s) of a racial minority." It may well be that when the First Circuit next speaks it will limit its decision in Ross to those cases on appeal at the time of its decision.[23]

SECOND, the First Circuit has limited its decision to convictions involving violent crimes. At least, for the moment, convictions not involving violent crimes will not be afforded the same constitutional protection as that outlined in Ross.

THIRD, Respondent asserts that it is implicit in the decision by the First Circuit that its decision only applies to

[23] This is not an uncommon occurrence. See Linkletter v. Walker, 381 U.S. 618 (1965); Commonwealth v. Arsenault, 233 N.E. 2d 730 (SJC-Mass. 1968).

and affects those criminal defendants who had proposed additional questions to the trial judge as to racial prejudice and the trial judge had refused or neglected to ask these questions or to otherwise "focus the attention of the prospective jurors as to any racial prejudice they might entertain."

Respondent suggests that the number of individuals complying with the aforementioned criteria, although uncertain in number, is, in any event, substantially smaller than the Commonwealth asserts.

CONCLUSION

From the foregoing, it is clear that the United States Court of Appeals for the First Circuit did not err in affirming a decision of the United States District Court for the District of Massachusetts granting Respondent's Petition for Writ of Habeas Corpus based upon the failure of the trial judge to inquire of the prospective jurors specifically as to racial prejudice.

Respondent urges this Court, in the alternative, to either deny Petitioner's Petition for Writ of Certiorari or to grant its Petition and summarily affirm. Failure to do so is,

> " . . . to see (the) decision in Ham v. South Carolina stillborn and to write an epitaph for those 'essential demands of fairness' recognized by (this) Court 40 years ago in Aldridge. (And to) 'bring the processes of justice into disrepute'

> not only by sanctioning the denial of a right required by 'essential demands of fairness' but also in failing to compel compliance by the court below with a precedent of (this) Court barely a year since decided." (App. A pp. 47-52 AT 52).

Respectfully Submitted,

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In the Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-1216.

THEODORE RISTAINO ET AL.,
PETITIONERS,

v.

JAMES ROSS, JR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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v.

JAMES ROSS, JR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Petitioners.

Opinions Below.

The opinion of the Court of Appeals is reported at 508 F. 2d 754 (A. 158). The order of the District Court is not reported. The opinions of the Supreme Judicial Court for the Commonwealth of Massachusetts are reported at Mass. Adv. Sh. (1973) 839; 296 N.E. 2d 810 (A. 128) and Mass. Adv. Sh. (1972) 873; 282 N.E. 2d 70 (A. 111).

Jurisdiction.

The judgment of the court below was entered on December 31, 1974. The petition for a writ of certiorari was filed on March 26, 1975, and was granted on May 27, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

I. Whether the lower court erred in determining that the refusal of the trial judge to ask prospective jurors a question specifically addressed to the issue of racial prejudice violated the rights of the respondent as guaranteed by the Fourteenth Amendment to the Constitution?

II. Whether the refusal to ask prospective jurors a question specifically addressed to the issue of racial prejudice constitutes error of constitutional dimension requiring reversal of a state court conviction by a federal court on a petition for writ of habeas corpus?

III. Whether *Ham* v. *South Carolina*, 409 U.S. 524 (1973), as interpreted by the First Circuit Court of Appeals, should be accorded retrospective application to a final state court conviction attacked collaterally upon a petition for writ of habeas corpus?

Constitutional Provision.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.

On June 17, 1970, the respondent was brought to trial in Suffolk County Superior Court before a judge and jury on three indictments charging armed robbery (Indictment No. 48032), assault and battery by means of a dangerous weapon (Indictment No. 48112), and assault and battery with intent to murder (Indictment No. 48033).

Prior to the commencement of the trial of the respondent and his co-defendants, each counsel submitted motions for examination of prospective jurors, which proposed questions designed to discover bias or prejudice on the part of the veniremen. Of the seven questions submitted by respondent Ross, only one involved a racial element.

> "5. Are there are any of you who believe that a white person is more likely to be telling the truth than a black person?" (A. 23.)

The trial judge denied the motions (A. 33). After extensive voir dire, covering seven days, fourteen jurors were empanelled (A. 102-103). The final deliberating jury consisted of 10 whites and 2 blacks. *Commonwealth* v. *Ross*, Mass. , 296 N.E. 2d 810, 815 (1973).

On July 2, 1970, a verdict of guilty on each indictment was returned and the respondent was sentenced to the Massachusetts Correctional Institution, Walpole, for concurrent terms of 18-30 years for armed robbery, 6-10 years for assault with a dangerous weapon, and 18-20 years for assault and battery with intent to murder. The Massachusetts Supreme Judicial Court unanimously affirmed these convictions. *Commonwealth* v. *Ross*, Mass. , 282 N.E. 2d 70 (1972) (A. 111).

The respondent then filed a petition for a writ of certiorari in the United States Supreme Court on the issue of the scope of the voir dire examination of prospective jurors. On January 22, 1973, this Court granted certiorari, vacated the judgment, and remanded the case to the Massachusetts Supreme Judicial Court for further consideration in light of *Ham* v. *South Carolina*, 409 U.S. 524 (1973), decided on January 17, 1973. *Ross* v. *Massachusetts*, 410 U.S. 901 (1973).

On remand, the Supreme Judicial Court addressed the following issue:

> " . . . whether the *Ham* decision requires that the defendant's conviction should be reversed on the ground that the trial judge refused to ask the veniremen whether they were racially prejudiced." *Commonwealth* v. *Ross*, Mass. , 296 N.E. 2d 810, 811 (A. 128).

and concluded:

> "We do not believe that the *Ham* case announced a new broad constitutional principle requiring that questions, designed to discover possible racial prejudice, be put to prospective jurors in all State criminal trials when the defendant is black (or from some other racial minority group), even when the defendant has requested such an inquiry and the statutory framework permits questioning to discover bias." *Commonwealth* v. *Ross*, Mass. at , *Id.* at 815 (A. 134).

The respondent filed a second petition for a writ of certiorari in the United States Supreme Court on the same issue as that raised by his previous application. On December 3, 1973, the petition for a writ of certiorari was denied. *Ross* v. *Massachusetts*, 414 U.S. 1080 (1973); Justice Marshall, with whom Justices Douglas and Brennan joined, filed a dissenting opinion.

The respondent then filed a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts. On June 15, 1974, the United States District Court granted the writ, stating:

> "The petitioner had a constitutional right to have the issue of racial prejudice specifically called to the attention of the prospective jurors." *Memorandum and Order* (A. 154).

The respondents therein filed notice of appeal in the United States Court of Appeals for the First Circuit. On December 31, 1974, the Court of Appeals for the First Circuit, by a two-to-one decision, affirmed the order of the District Court. *Ross* v. *Ristaino*, 508 F. 2d 754 (1st Cir. 1974) (A. 158).

Summary of Argument.

I. The opinion of this Court in *Ham* v. *South Carolina*, 409 U.S. 524 (1973), does not require reversal of the respondent's state court conviction.

(1) *Ham* v. *South Carolina*, *supra*, is distinguishable from the instant case in that Ham's state court trial involved allegations of racially motivated prosecution, thus making the race of the defendant an issue. The instant case involves no peculiar or special circumstances. Moreover, the voir dire procedure employed in the instant case was far more detailed and conscientious than that employed by the trial judge in *Ham*, *supra*.

(2) This Court's decision in *Ham* did not announce a new constitutional rule of universal applicability. The decision merely stated that the failure to ask the proposed questions directed toward possible racial prejudice under the circumstances of that case violated the "fundamental demands of fairness" as guaranteed by the Fourteenth Amendment. Therefore, if the voir dire procedure is substantially fair, the mere failure to ask specific questions does not necessitate reversal of a state court conviction by a federal court upon a petition for writ of habeas corpus.

II. The First Circuit Court of Appeals has erred in determining that the refusal of a trial judge to ask a question addressed to the issue of racial prejudice is error of constitutional dimension cognizable by a federal court upon a petition for writ of habeas corpus. For, that determination was based merely upon speculation as to possible prejudice to the defendant and lacks any indication of manifest error as is traditionally required to justify federal court interference with state court criminal convictions. The First Circuit has, in effect, assimilated its task in this matter as that of a court of appellate review over the highest appellate court of the Commonwealth of Massachusetts.

III. A new constitutional rule mandating that specific questions on the issue of racial prejudice must, on the request of a black defendant, be asked of prospective jurors on voir dire should not be applied retroactively to those cases where trial has commenced [redacted] (to the date of the decision announcing the new rule. Such a procedural rule, when analyzed in light of the purpose of the new rule, the reliance on the prior rule and the effect of retrospective application of the new rule on the administration of justice, falls within that category of cases involving a defendant's right to an impartial jury, *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), and *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), and for retroactivity purposes should not be given more extended application than accorded the rules announced in *Duncan*, *supra*, and *Taylor*, *supra*, which were held prospective. *DeStefano* v. *Woods*, 392 U.S. 631 (1968), and *Daniel* v. *Louisiana*, 420 U.S. 31 (1975).

Moreover, a procedural Due Process rule should not be held applicable to state court judgments which have become final and are not attacked collaterally upon a petition for a writ of habeas corpus. Such application violates a valid state interest in the finality of judgment. The petitioners suggest that the test to be applied is whether the state court procedures complied with Fourteenth Amendment Due Process. If that test is met, the purpose for which habeas corpus is made available is satisfied and nothing more should be required.

Argument.

I. Ham v. South Carolina, 409 U.S. 524 (1973), does Not Require that Specific Questions Addressed to Possible Racial Bias be Asked in the Instant Case.

A. *Ham v. South Carolina, 409 U.S 524 (1973), Is Distinguishable from the Case at Bar.*

In *Ham* v. *South Carolina, supra,* this Court held that the procedure followed by the trial court in conducting the voir dire of prospective jurors in that case violated the defendant's Fourteenth Amendment Due Process rights. The facts surrounding Ham's conviction formed the basis for this Court's decision. Ham was tried and convicted in South Carolina for possession of marijuana. Ham was a young bearded Negro well-known in the community and well-known as a civil rights activist. His defense at trial was that law enforcement officers were "out to get him" because of his civil rights activities and that he had been framed. Prior to the trial judge's voir dire examination of prospective jurors, counsel for Ham requested that the judge ask the jurors four questions relating to possible prejudice against the defendant. Two of the questions were addressed to the possibility of racial prejudice,[1] one to possible prejudice against beards and one to possible prejudice resulting from pretrial publicity. The trial judge declined to ask these specific questions requested by Ham, but did pose three general questions as to bias, prejudice or partiality as required by South Carolina statute.[2]

---

[1] "1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?"

"2. You have no prejudice against Negros? Against black people? You would not be influenced by the use of the term 'black?'"

[2] S.C. Code § 38-202 (1962).

Within this factual framework, this Court held:

> " . . . we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice. South Carolina law permits challenges for cause, and authorizes the trial judge to conduct *voir dire* examination of potential jurors. The State having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that *under the facts shown by this record* the petitioner be permitted to have the jurors interrogated on the issue of racial bias. Cf. *Groppi* v. *Wisconsin*, 400 U.S. 505, 508 (1971); *Bell* v. *Burson*, 402 U.S. 535, 541 (1971)." (Emphasis supplied.) *Ham* v. *South Carolina*, 409 U.S. at 527.

Thus, within the unique factual framework present in the *Ham* case, this Court was compelled to find that the failure to question prospective jurors on the issue of racial prejudice violated fundamental fairness.

Petitioners agree that where racial overtones are apparent in a case, where there is a real issue as to the credence to be given the testimony of a black defendant and where the defendant is demonstrably a special target for racial prejudice, fairness requires that the attention of prospective jurors must be focused upon the possibility of racial prejudice. However, the burden is on the defendant to demonstrate that such a fact pattern exists; the mere existence of a black defendant is not sufficient. Petitioners submit that the defendant in the instant case not only did not meet this burden, but could not, as those special elements are not present in the instant case, and Ross' state court trial complied with the essential demands of fairness.

Ross and two co-defendants were tried and convicted of armed robbery, assault and battery by means of a dangerous weapon and assault and battery with intent to murder. Prior to the voir dire examination of prospective jurors, counsel for Ross requested that the trial judge ask the veniremen seven questions. Only one of these questions touched upon the issue of racial prejudice.

> "5. Are there any of you who believe that a white person is more likely to be telling the truth than a black person?" (A. 23.)[3]

The discussion between the trial judge and counsel concerning the voir dire procedure indicates that counsel for the defendants were concerned with possible prejudice in two areas: (1) racial prejudice because the defendants were black; and (2) possible lack of impartiality because the victim was a security guard. In chambers, with respect to the racial question, the trial judge asked the attorney for co-defendant Daniels:

> " . . . I thought from something Mr. Donnelly said, he might have wanted on the record something which was peculiar to this case, or peculiar to the circumstances which we are operating under here which perhaps he didn't want to say in open court.
>
> "Is there anything peculiar about, Mr. Donnelly?

[3] Additional questions, specifically addressed to racial prejudice, were requested by co-defendants Daniels and Williams (A. 24-28). However, as found by the Supreme Judicial Court of Massachusetts, Ross did not adopt those questions as his own and may not now argue that it was error for the trial judge to refuse to ask those questions. See *Commonwealth* v. *Ross*, Mass. , 296 N.E. 2d 810, 812 n.4 (1973) (A. 130).

> "[Counsel for the defendant, Daniels]: No, just the fact that the victim is white, and the defendants are black." (A. 29.)

Counsel for Ross made no statement with reference to any peculiar or special circumstance. Therefore, no special circumstances were brought to the attention of the trial judge, nor do any exist. There was no indication that Ross might have been a special target for racial prejudice. In contrast, the *Ham* trial contained indications of racially motivated prosecution. The questions requested in *Ham* were addressed specifically to the question of possible racial bias against the defendant. In *Ross*, however, the only question requested (whose denial is at issue) was not specifically addressed to possible racial prejudice directed against the defendant. The question was merely addressed to the credibility to be afforded a black witness as opposed to a white witness. Ross did not testify. His credibility therefore did not become an issue. Therefore the refusal to grant the request could not be deemed prejudicial.

The colloquy between the trial judge and counsel for the defendants demonstrates that he was sensitive to the concern of the defendants and carefully determined the procedure he thought would best guarantee a fair trial.

> "I am going to approach it, as I have said, with all due respect to the problems, and they are important problems which you gentlemen have raised with these several questions which you have asked the Court to put in addition to the usual statutory inquiry, and without going into the details as to my reasons, I feel that no purpose would be accomplished by asking such questions *in this instance*." (Emphasis supplied.) (A. 29.)

" . . . this Judge anyway — and I am sure all Judges of this Court — would take the time to impress upon them before, during, and after the trial, and before their verdict, that their oath means just what it says, that they are to decide the case on the evidence, with no extraneous considerations." (A. 29-30.)

"I believe that that is the best that can be done with respect to the problems which — as I said, I regard as extremely important. . . ." (A. 30.)

As one of his reasons for denying the defendant's request for specific questions addressed to racial prejudice, the trial judge stated:

" . . . I would be simply astonished if I ever asked a juror, or a group of jurors, or ever heard a lawyer ask a group of jurors if they are white, 'Are you biased against black,' if they are white, or if they are black, 'are you biased against white.' I would be simply astonished if I had an affirmative answer. The man who has the disease of bias would be the last one that would admit it." (A. 30-31.)

While refusing to ask the specific questions requested, the trial judge did recognize the importance of the problem and indicated that he would give a preliminary instruction with particular reference to statutory question No. 1 (A. 29-30).[4]

[4] Mass. Gen. Laws, c. 234, § 28 " . . . whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice, therein; . . . "

The trial judge also agreed to question the prospective jurors with regard to their relationship with law enforcement officers.[5] (A. 31.)

Petitioners submit that examination of the entire colloquy between the trial judge and counsel for the defendants indicates that the trial judge was sensitive to the problem of possible prejudice and adopted a procedure which he felt could best insure fundamental fairness without injecting racial bias into the trial.

As each pool of prospective jurors was examined, the trial judge instructed them that they must inform the court if they were unable to return a fair and impartial verdict based solely upon the evidence (A. 36-38, 47-49, 71-73, 82-84, 95-97).

"Can you under oath return a fair and impartial verdict based upon the evidence that you hear in the courtroom, and not on any extraneous factors; no bias or prejudice or personal interest in the case, and no prejudice of any kind.

"You will recall that when you took your oath, that it was probably impressed upon you the first day that you arrived here, and perhaps has been emphasized many times by Judges throughout the month, that you were told that under your oath, you have an absolute duty to render fair and impartial verdicts based upon the evidence that you hear in the courtroom, and no extraneous factors.

[5] "Are you presently, or have you in the past worked for a police department or a district attorney's office, or do you have any immediate relative who also is or was engaged in such work. Is there a member of your immediate family, brother, sister, husband, wife, son, who is working in that capacity, or has worked in that capacity in a police department or district attorney's office, or have you worked in that capacity, or do you work in that capacity at the present time?" (A. 38.)

"The Clerk in asking you the first question is giving you an opportunity to inform the Court, if you believe that you cannot render a fair and impartial verdict on the evidence in this case; giving you an opportunity to inform the Court if you have serious doubt as to whether you can render a fair and impartial verdict on the evidence of this case.

"Under this question, and under your oath, when this question is asked, if you believe that you cannot render a fair and impartial verdict on the evidence in this case, or if you have a doubt as to whether you can so render a fair and impartial verdict on the evidence in this case, you have a duty to inform the Court when that question is asked by standing or raising your hand.

. . . . . .

"In addition to examining whatever you know from the news media in terms of this first question which the Clerk will put to you, I would direct you to examine all aspects of the case and everything that you presently know about the case, both in this courtroom and from what I have told you so far, and determine whether you should inform the Court as to whether you cannot return a fair and impartial verdict, or whether you have a doubt as to your capacity to render a fair and impartial verdict based upon the evidence in the case." (A. 71-72, 73.)

After the defendants were asked to stand and were set at the bar to be tried, the clerk posed the questions, outlined above, to the prospective jurors. Several jurors raised their hand, indicating possible prejudice. Each of these jurors was questioned individually by the trial judge. One prospective juror was excused for admitted racial prejudice; two were excused for unspecified prejudice; seven prospective jurors were

excused because they had already formed an opinion; seven were excused because of connections with police work; and one prospective juror was excused because of affiliation with the university where the crime had occurred. *Commonwealth* v. *Ross*, Mass. at , 296 N.E. 2d at 815 (A. 133-134).

In a further effort to insure a fair trial and prevent racial bias from becoming an issue, the trial judge decided "in the interest of good sense" not to mention the Muslim names of defendants Daniels and Williams as they appeared in the indictments, but to refer to them as Ross, Daniels, and Williams. *Commonwealth* v. *Ross*, Mass. at , *Id.* at 813 (A. 39).

The final jury of twelve was composed of ten white persons and two black persons. *Commonwealth* v. *Ross*, Mass. at , *Id.* at 815. As opposed to the trial judge in *Ham*, who merely asked four general questions, the trial judge, in the instant case, scrupulously examined the jurors on the issue of bias and prejudice and several jurors were excused for this reason. Thus, the petitioners suggest that the possibility that racial bias might infect the jury in the instant case was sufficiently cured by the trial judge's instructions coupled with the specific questions addressed to the prospective jurors.

The special circumstances of *Ham* are not present in the instant case and the trial judge in the instant case was sensitive to the possibility of a racial problem and responded to it, in contrast to the trial judge in *Ham*.

For all the above reasons, the petitioners submit that *Ross* is distinguishable from *Ham* and that the First Circuit Court of Appeals erred in holding *Ham* applicable to the facts of this case.

B. *This Court in Ham v. South Carolina, 409 U.S. 524 (1973), did Not Enunciate a New Constitutional Rule of Universal Applicability.*

In *Ham*, 409 U.S. at 526-527, this Court held only that the principle enunciated in *Aldridge* v. *United States*, 283 U.S. 308 (1931), was grounded upon the Fourteenth Amendment Due Process Clause. In *Aldridge*, 283 U.S. at 310, this Court, in the exercise of its supervisory powers over the lower federal courts, stated that the "essential demands of fairness" required the trial judge under the circumstances of that case to interrogate the veniremen with respect to racial prejudice upon the request of counsel for a Negro criminal defendant. 283 U.S. at 310.[8]

This Court, in *Ham*, noted that the *Aldridge* decision was not grounded upon any constitutional requirement. However, the Court reasoned that,

> "[s]ince one of the purposes of the Due Process Clause of the Fourteenth Amendment is to insure these 'essential demands of fairness,' *e.g.*, *Lisenba* v. *California*, 314 U.S. 219, 236 (1941), and since a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race, *Slaughter-House Cases*, 16 Wall. 36, 81 (1873), we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice." 409 U.S. at 526-527.

[8] While it has been maintained that no special circumstances were involved in *Aidridge*, a close reading of that opinion indicates that the request was based upon far more than the fact that the defendant was black and the victim white. Rather, counsel represented to the trial judge that at a prior trial of the defendant where the jury had disagreed, a woman juror had told him that the fact that the defendant was a negro had "somewhat influenced her." The Court stated:

> "The reference to what counsel had heard as to the attitude of a juror on the previous trial, where the jury had disagreed, indicated the purpose of the question, which was clear enough to invite appropriate action by the court." 283 U.S. at 311.

Thus, this Court ruled only that essential fairness was constitutionally guaranteed and made applicable to the states by the Fourteenth Amendment. The Court did not hold that the Constitution required that a specific procedure be utilized. In fact, this Court specifically recognized that it is within the discretion of the trial judge to determine the procedure to be utilized in order to insure fairness.

> " . . . the trial judge was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner. The Court in *Aldridge* was at pains to point out, in a context where its authority within the federal system of courts allows a good deal closer supervision than does the Fourteenth Amendment, that the trial court 'had a broad discretion as to the questions to be asked,' 283 U.S., at 310. The discretion as to form and number of questions permitted by the Due Process Clause of the Fourteenth Amendment is at least as broad. In this context, either of the brief, general questions urged by the petitioner would appear sufficient to focus the attention of prospective jurors on any racial prejudice they might entertain." 409 U.S. at 527.

The Supreme Judicial Court has, petitioners suggest, properly interpreted this decision to be limited to its facts.

"We hold, therefore, that the *Ham* decision does not, in this case, dictate that the trial judge was constitutionally required to question prospective jurors specifically concerning their possible racial prejudices beyond the comments and questions that were put to them. While the due process clause of the Fourteenth Amendment requires the states to insure the essential demands of fairness in criminal trials, we believe that the judge's refusal to ask specific questions did not, in this case, violate the defendant's right to the demands of fairness." *Commonwealth* v. *Ross*, Mass. Adv. Sh. (1973) at 846.

The Ninth Circuit has similarly distinguished the *Ham* decision.

"*Aldridge* and *Ham* are distinguishable. In *Aldridge* a black man was charged with the murder of a white policeman. All the jurors were white. Recognizing that the trial court has 'a broad discretion as to the questions to be asked,' the Court held that the exercise of this discretion is 'subject to the essential demands of fairness' and that under the circumstances of that case the court erred in failing to permit counsel to ask questions relative to 'racial prejudice.' 283 U.S. at 310-311. . . . *Ham* involved the prosecution of a black civil rights leader for possession of drugs. 'His basic defense at the trial was that law enforcement officers were "out to get him" because of his civil rights activities, and that he had been framed on the drug charge." 409 U.S. at 525. . . . Following *Aldridge* the Court again recognized 'the traditionally broad discretion accorded to the trial judge in conducting *voir dire*', 409 U.S. at 528 . . ., but held that *under the facts shown by the record* the jurors should have been interrogated on 'the issue of racial bias.' *Id.* at

527." (Emphasis supplied.) *United States* v. *Walker*, 491 F. 2d 236, 239 (9th Cir. 1974).

The petitioners acknowledge that five Circuit Courts of Appeal, on direct review of cases arising within the federal system, have interpreted *Ham* as enunciating a new constitutional requirement. However, in none of these cases is the scope of that requirement delineated.[7]

In *United States* v. *Booker*, 480 F. 2d 1310 (7th Cir. 1973), the Seventh Circuit, acting within its supervisory capacity, addressed the issue and held that *Aldridge* was controlling, stating:

"[f]or that reason reversal need not rest on a constitutional ground." 480 F. 2d at 1311.

However, the court also discussed the import of the *Ham* decision and stated:

"It is nevertheless significant that a unanimous Supreme Court recently reversed a state judgment because the trial

[7] *United States* v. *Robinson*, 485 F. 2d 1157 (3d Cir. 1973); *Featherston* v. *United States*, 491 F. 2d 98 (5th Cir. 1974); *United States* v. *Ross*, 477 F. 2d 551 (6th Cir. 1973); *United States* v. *Powers*, 482 F. 2d 941 (8th Cir. 1973); *United States* v. *Robinson*, 475 F. 2d 376 (D.C. Cir. 1973). Cf. *United States* v. *Grant*, 494 F. 2d 120 (2d Cir. 1974) (failure to ask a question directed to racial bias was, if error, harmless beyond a reasonable doubt in view of overwhelming evidence).

judge refused to ask prospective jurors about possible prejudice against black people. [Citation omitted.] There was perhaps a greater risk of prejudice against Ham because of his participation in civil rights activities than against the appellant in this case, but the Court's appraisal of the error as violative of the 'essential demands of fairness' protected by the Due Process Clause, 409 U.S. at 526 . . . persuades us that on direct review of a federal conviction we should reverse without attempting to appraise the actual likelihood of prejudice to this appellant." *Id.* at 1311.

The petitioners suggest that the language of the Seventh Circuit indicates that upon a *collateral* review of a state court proceeding some indication of actual prejudice would be required. If the Seventh Circuit has interpreted *Ham* as announcing a new constitutional rule of universal applicability it would be inconsistent with such a rule to then indicate that an appraisal of the actual likelihood of prejudice would be required upon collateral review. This view is consistent with that of the Supreme Judicial Court of the Commonwealth requiring that there be present some indication that the defendant is a special target of racial prejudice before refusal to address questions as to the possibility of racial prejudice on the part of prospective jurors constitutes a denial of fundamental fairness.

"We cannot agree that the mere accusation of a black defendant in a crime with a white victim or the fact that the victim is a security guard constitutes 'circumstances which reasonably present the issue of racial prejudice' (*Commonwealth* v. *Ryles*, Mass. , (1973), cert. den. 414 U.S. 980 (1973)), and make the defendant

a special target for racial prejudice. See *Commonwealth* v. *Ross*, Mass. , (1973), cert. den. 414 U.S. 1080 (1973); *Commonwealth* v. *Bumpus*, Mass. (1974). 'We have several times indicated that the fact that the defendant is black and the victim white does not suffice to bring a case within the *Ham* rule and to require specific questions by the trial judge as to possible prejudice among the veniremen.' *Commonwealth* v. *Bumpus*, *supra*, at . The ethnic identities of the defendant and victim, without other factors underscoring the racial elements of the case and their specific application to the defendant, are insufficient to invoke the special precautions of the *Ham* case. The victim's occupation alone is not one such factor." *Commonwealth* v. *Lumley*, Mass. , 327 N.E. 2d 683, 687 (1975).[8]

The decision of the First Circuit Court of Appeals seeks to avoid resolution of the question of the proper interpretation of *Ham*.

"The contours of the *Ham* decision were not sharply defined by the Court. Justice Rehnquist's opinion did not explicitly state that whenever a black defendant requests the trial judge to inquire specifically on the issue of racial prejudice on *voir dire* the trial judge must do so. Nor did the opinion explicitly state that the defense request for specific questions directed to racial prejudice need only be honored where the defendant was a civil rights leader or

[8] See also, *Commonwealth* v. *Ryles*, Mass. (1973) (Mass. Adv. Sh. [1973] 849), *cert. denied*, 414 U.S. 980 (1973); *Commonwealth* v. *Rodriguez*, Mass. (1973) (Mass. Adv. Sh. [1973] 1181); *Commonwealth* v. *Bumpus*, Mass. (1974) (Mass. Adv. Sh. [1974] 477); *Commonwealth* v. *Pinckney*, Mass. (1974) (Mass. Adv. Sh. [1974] 483).

other 'special target of racial prejudice,' which was the construction the Supreme Judicial Court gave *Ham*." (Footnotes omitted.) *Ross* v. *Ristaino*, 508 F. 2d 754, 756 (1st Cir. 1974).

The court then approved an implicit finding of the federal District Court that,

> "a black defendant charged with violent crimes against a white security officer would be likely to be a special target of racial prejudice." *Ibid.*

Thus the court has extended the scope of the *Ham* decision far beyond the framework of that case and, in effect, has determined that the *Ham* rule is applicable to every case involving a black defendant and a white victim. Further, the court has failed to assert any constitutional basis for doing so.

Petitioners suggest that the Supreme Judicial Court's interpretation of *Ham* in *Commonwealth* v. *Ross*, *supra*, and related cases, is correct.

First, the language used by the majority is specific.

> " . . . we think that the Fourteenth Amendment required the judge *in this case* to interrogate the jurors upon the subject of racial prejudice. South Carolina law permits challenges for cause, and authorizes the trial judge to conduct *voir dire* examination of potential jurors. The State having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that *under the facts shown by this record* the petitioner be permitted to have the jurors interrogated on the

> issue of racial bias. Cf. *Groppi* v. *Wisconsin*, 400 U.S. 505, 508 (1971); *Bell* v. *Burson*, 402 U.S. 535, 541 (1971)." (Emphasis supplied.) 409 U.S. at 527.

The Court precisely stated that the facts of the case necessitated their ruling of law. However, the United States District Court dismissed the language used by this Court, stating, in effect, that Mr. Justice Rehnquist merely utilized such "common judicial locutions" as "in this case" and "under the facts shown on this record." *Memorandum and Order* (A. 153). Petitioners submit that this Court meant exactly what it said; that this specific reference to the facts of the case is traditional in cases in which the Court is deciding that a particular fact pattern requires a determination that a defendant's right to due process has been violated.[9]

Second, the petitioners suggest that by limiting the constitutional basis for their decision to the Fourteenth Amendment, this Court was limiting invocation of the *Ham* rule to cases demonstrating a significant possibility of prejudice.

Certiorari was granted in *Ham* limited to the question:

> "Whether the trial judge's refusal to examine the jurors on *voir dire* as to whether petitioner's race or pretrial publicity would affect their ability to render a fair verdict violated petitioner's right to an impartial jury, guaranteed by the Sixth and Fourteenth Amendments to the Constitution?" 404 U.S. 1057 (1972).

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[9] See: *Webb* v. *Texas*, 409 U.S. 95, 98 (1972):

> "In the circumstances of this case, we conclude that the judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment."

In his petition for certiorari (Supreme Court Docket No. 71-5139) Ham argued that his right to an impartial jury as guaranteed by the Sixth and Fourteenth Amendments had been violated by the trial judge's refusal to examine jurors as to whether petitioner's race would affect their ability to render a fair verdict. This Court was presented, therefore, with the opportunity to rule that the Sixth Amendment guarantee of an impartial jury mandated that questions addressed to the possibility of racial prejudice always be asked of veniremen where there is a black defendant. The majority of this Court, however, declined the opportunity and decided *Ham* solely upon the Due Process Clause of the Fourteenth Amendment. Nothing in the majority opinion indicates that the Sixth Amendment guarantee of a right to an impartial jury required examination of prospective jurors on the issue of racial prejudice. However, in contrast to the majority opinion in *Ham*, Justice Marshall, concurring in part and dissenting in part, based his concurrence upon the Sixth Amendment guarantee to an impartial jury, thereby disagreeing with the majority opinion that the trial judge acted properly in foreclosing other avenues of relevant inquiry, specifically, inquiry as to prejudice against beards. *Ham* v. *South Carolina*, 409 U.S. at 534. Indeed, Justice Marshall based his dissent from the denial of Ross' second petition for writ of certiorari upon the same Sixth Amendment language. *Ross* v. *Massachusetts*, 414 U.S. 1080 (1973).

The fair inference then is that the majority of this Court in *Ham* did not think that the issue raised in *Ham* necessitated a Sixth Amendment ruling which would be applicable to every case in which there was a black defendant, but, simply, that it was not fair to refuse to ask the questions under the circumstances present in that case. Therefore, petitioners submit that by so limiting the ground for the decision in *Ham* to the Fourteenth Amendment Due Process Clause, the majority of this

Court intended to limit the effect of their decision to those cases involving circumstances where the possibility of prejudice was of sufficient dimension as to require a deviation from the voir dire procedure normally employed in the state courts. Lacking a showing of special circumstances, the petitioners submit that the voir dire procedures employed in the instant case were sufficient to insure the essential demands of fairness required by the Fourteenth Amendment as enunciated in *Ham* v. *South Carolina*, *supra*, and nothing more is required.

II. The Error Complained of in the Instant Case does Not Reach a Level of Constitutional Dimension Justifying Federal Court Interference with a State Court Conviction Attacked Collaterally upon a Petition for Writ of Habeas Corpus.

At trial, all prospective jurors were asked the statutory questions required under Mass. Gen. Laws, c. 234, § 28. In addition, the trial judge exercised his discretion to broaden the scope of the voir dire, *Commonwealth* v. *Geagan*, 339 Mass. 487 (1959), cert. denied sub nom. *Geagan* v. *Massachusetts*, 361 U.S. 895 (1959), and questioned the jurors as to their relationship with law enforcement authorities (A. 47, 49, 71, 73, 82, 84, 95, 97). He repeatedly directed the veniremen to question their sensitivity as to any bias or prejudice.

> "Can you under oath return a fair and impartial verdict based upon the evidence that you hear in the courtroom, and not on any extraneous factors; no bias or prejudice or personal interest in the case, and no prejudice of any kind." (A. 71.)

Both the federal District Court and the First Circuit Court of Appeals acknowledged that the questions propounded to the prospective jurors were far more extensive and carefully worded than those in either *Ham* or *Aldridge*. They were exemplary in every respect. *Ross* v. *Ristaino*, 508 F. 2d 754, 755 (1st Cir. 1975). However, the court held that a black defendant "would be likely" to be a special target for racial prejudice and, therefore, the failure to ask a question specifically addressed to the racial issue required reversal of the state court conviction. *Id.* at 756, 757.

The United States Supreme Court has strictly adhered to the principle that the findings of the trial court upon the issue of voir dire ought not be set aside by a federal court on collateral review of a state court conviction absent a showing of manifest error. *Reynolds* v. *United States*, 98 U.S. 145, 156 (1878) [quoted with approval in *Irvin* v. *Dowd*, 366 U.S. 717, 723-724 (1961)]. While reaffirming the essential demands of fairness test and the broad discretion of the trial judge in *Ham*, this Court left unaltered the manifest error standard of *Reynolds*. However, in this case, based merely upon speculation, the federal court has elevated this procedural issue (the scope of voir dire) to one of constitutional dimension, and reversed the state court conviction without the requisite demonstration of manifest error.

The petitioners submit that mere speculation as to the possibility of unfairness does not constitute error of constitutional dimension.

> " . . . [T]he burden of showing essential unfairness [must] be sustained by him who claims such injustice and seeks to have the result set aside, and that it [must] be sustained not as a matter of speculation but as a demonstrable reality." *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281 (1942).

> "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." *Holt* v. *United States*, 218 U.S. 245, 251 (1910).

The petitioners further submit that on a collateral attack upon a final state court judgment a federal court may interfere only when the alleged error is so conspicuous and substantial as to result in a constitutionally unfair trial.

> "It is only where criminal trials in state courts are conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice that due process is offended and that federal court interference is warranted." *Chavez* v. *Dickson*, 280 F. 2d 727, 735 (9th Cir. 1960), cert. denied, 364 U.S. 934 (1961).

All that is guaranteed to every black state defendant by *Ham* is that, on voir dire, the essential demands of fairness required by the Due Process Clause of the Fourteenth Amendment must be met; *Ham* does not guarantee to every black state defendant the extension of the procedural rule required of federal courts under *Aldridge*. However, the First Circuit Court of Appeals appears to have extended its supervisory powers over the lower federal courts to include supervision of state court procedure upon voir dire. This practice has recently been condemned by the United States Supreme Court.

> "The [First Circuit] Court of Appeals in this case noted, as petitioner urged, that its review was 'the narrow one of due process, and not the broad exercise of supervisory

power that [it] would possess in regard to [its] own trial court' [473 F. 2d at 1238]. We regard this observation as important for not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.' *Lisenba* v. *California*, 314 U.S. 219, 236 (1941). We stated only this Term in *Cupp* v. *Naughten*, 414 U.S. 141 (1973), when reviewing an instruction given in a state court:

> 'Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.'"

Donnelly v. *DeChristoforo*, 416 U.S. 637 (1974).

The petitioners submit that the question at issue is not merely whether an act has occurred that is unfair, but whether there is a conspicuous and substantial error which results in a *constitutionally* unfair trial. However, the First Circuit has based its decision solely upon the "mere likelihood" of possible prejudice to the defendant. Petitioners submit that the decision of the First Circuit Court of Appeals goes beyond the scope of collateral review in habeas corpus and extends unduly the perimeters of what constitutes a constitutionally unfair trial.

> " . . . [A]part from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten, as in *Moore* v. *Dempsey* [261 U.S. 86], that the proceeding is more a spectacle (*Rideau* v. *Louisiana*, 373 U.S. 723, 726), or trial by ordeal (*Brown* v. *Mississippi*, 297 U.S. 278, 285) then a disciplined contest." *United States* v. *Augenblick*,' 393 U.S. 348, 356 (1969).

Petitioners, therefore, request this Court to reestablish a judicial balance between federal and state courts by requiring a showing of real prejudice before the federal court may intervene.

> "The constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged *semper ubique et ab omnibus* (*Otis* v. *Parker*, 187 U.S. 606, 609), wherever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt — that discredit will even touch the great immunities assured by the Fourteenth Amendment — if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free." *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934).

Therefore, petitioners submit that the First Circuit Court of Appeals has impermissibly extended its supervisory power over the state court. It has, in effect, ignored the good-faith allegiance that state court judges pledge to a vigorous enforcement of the United States Constitution — even in their own courts.

III. The Interpretation Accorded Ham v. South Carolina, 409 U.S. 524 (1973), by the First Circuit Court of Appeals should Not be Retroactively Applied.

The First Circuit Court of Appeals extended the *Ham* decision and accorded it retroactive effect. The Court simply inferred that retroactive application of *Ham* was mandated by this Court's treatment of the petition for writ of certiorari in *Ross* v. *Massachusetts*.[10]

> "The Supreme Court implicitly decided that *Ham* applied to this case when it summarily vacated the judgment of the Supreme Judicial Court of Massachusetts and remanded that case to that court for reconsideration in light of *Ham*. . . ." *Ross* v. *Ristaino*, 508 F. 2d 754, 756 (1st Cir. 1974).

[10] Petitioners submit that the granting of certiorari in *Ross* five days after the decision in *Ham* and the summary vacation and remand of *Ross* for reconsideration in light of *Ham* merely indicates that *Ham* was indeed limited in its application to those cases presenting special circumstances or to those cases fitting within the factual framework of the *Ham* case. Had this Court in *Ham* pronounced a constitutional rule of universal applicability, the Court would have reversed outright or reversed and remanded for further proceedings not inconsistent with the *Ham* decision. Compare *Heller* v. *New York*, 413 U.S. 483 (1973), dissenting opinions at 494, 495.

Moreover, the petitioners submit that nothing in this Court's opinion in *Ham* indicates that a decision on the merits of the question of retroactivity was reached.

Petitioners suggest that if the First Circuit Court of Appeals' expanded view of *Ham* is correct as a matter of constitutional law, then this new rule should not be applied retroactively to cases in which trial has commenced prior to the date of that decision.

In *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965), this Court recognized that the Constitution neither prohibited nor required retroactive application of a decision. Following *Linkletter*, this Court developed guidelines for making the determination as to whether a decision, announcing a new constitutional rule, should be accorded retrospective application.

> "[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved." *Johnson* v. *New Jersey*, 384 U.S. 719, 728 (1966).

In *Stovall* v. *Denno*, 388 U.S. 293 (1967), holding *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), applicable only to those cases (*Wade* and *Gilbert*), and to all future cases arising after the date of that decision, this Court stated the consideration which should affect the judgment as to whether a case announcing a new constitutional rule should be applied prospectively only, to be:

"(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, at 297.

The petitioners suggest that the question of the retroactive application to be accorded the rule in *Ham* is susceptible to analysis under the three-prong test enunciated in *Stovall*, *supra*.[11]

In applying the first, or purpose, factor, the Court has sought to determine whether the error the new rule seeks to cure substantially impaired the truth-finding function of the court, thus casting substantial doubt on the over-all reliability of the guilt-determining process. *Stovall* v. *Denno*, *supra*. This Court, however, in *Stovall*, cautioned against an absolute application of this principle.

"[A]lthough the *Wade* and *Gilbert* rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence, 'the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree.' *Johnson* v. *New Jersey*, [384 U.S. 719 (1966)], 728-729. The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.' 384 U.S., at 729. Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the

[11] Cf. *Robinson* v. *Neil*, 409 U.S. 505 (1973), and *Moore* v. *Illinois*, 408 U.S. 786 (1972).

impact of retroactivity upon the administration of justice." *Stovall* v. *Denno*, at 298.

Therefore, the fact that the purpose of the new rule affects or aids the truth-determining process does not *require* that the rule be given retroactive effect.

Assuming, for the purpose of argument, that a new constitutional rule of universal application was announced in *Ham*, the petitioners submit that the purpose of that rule was directed toward the function of the jury. Therefore, consideration of the prospective application that petitioners suggest should be accorded *Ham* falls within the context of the decisions of this Court involving a defendant's right to trial by an impartial jury.

In *DeStefano* v. *Woods*, 392 U.S. 631 (1968), this Court held that *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), and *Bloom* v. *Illinois*, 391 U.S. 194 (1968), should be granted prospective effect only. In *Duncan* the court had held that, since

"trial by jury in criminal cases is fundamental to the American scheme of justice, . . . the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee." (Footnote omitted.) 391 U.S. at 149.

In *Bloom*, this Court held that the right to jury trial applied to serious criminal contempts. 391 U.S. at 201-210. The Court has stated that the purpose of the right to an impartial jury is to "prevent arbitrariness and repression." *DeStefano* v. *Woods*, *supra*, at 633. Similarly, the new rule announced in

Ham arose within the context of alleged arbitrary and repressive prosecution based upon the defendant's race.

In *DeStefano*, the Court concluded that even given such a purpose it did not follow that every judgment rendered prior to the decisions in *Duncan* and *Bloom* were so fatally infected with unfairness as to require reversal. Nor, the petitioners submit, does it follow that every decision rendered prior to *Ham* was fatally infected with unfairness.

While the petitioners acknowledge that allowing a black defendant to ask questions directed to racial prejudice of the prospective jurors may aid in determining the impartiality of the fact finders, other factors should be considered:

> " . . . We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial." *Johnson* v. *New Jersey*, 384 U.S. at 729 (1966).

In the instant case, the defendant had the additional protection of peremptory challenges to safeguard his right to an impartial jury. See: *Groppi* v. *Wisconsin*, 400 U.S. 505 (1971) (dissenting opinion of Justice Black).

To require that a new rule be accorded retroactive effect it must be demonstrated that the "major purpose of [the] new constitutional doctrine is to overcome" a trial aspect "that *substantially* impairs its truth-finding function." (Emphasis supplied.) *Williams* v. *United States*, 401 U.S. 646, 653 (1971).

Unless this Court is willing to assume that, in every case involving a black defendant, failure to ask the proposed questions will necessarily result in a jury infected with racial prejudice, it cannot be maintained that the voir dire procedure

utilized prior to the *Ham* decision substantially impaired the truth-finding function.

Recently, this Court ruled in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), that the Louisiana jury-selection system, whose operation resulted in the near exclusion of women from jury service, violated a defendant's Sixth and Fourteenth Amendment right to an impartial jury trial. The defendant's conviction was reversed. On January 21, 1975, this Court considered, on appeal, the case of *Daniel* v. *Louisiana*, 420 U.S. 31 (1975), raising the same issue decided in *Taylor*. The Court held:

> " . . . *Taylor* is not to be applied retroactively, as a matter of federal law, to convictions obtained by juries empaneled prior to the date of that decision." *Daniel*, at 32.

The purpose of the rule enunciated in *Taylor* and in *Duncan*, as in *Ham*, petitioners suggest, is directed toward the function of the jury in the criminal justice system: to ensure impartiality and prevent arbitrariness and repression. In terms of the purpose of the new rule, petitioners suggest that nothing in *Ham* demonstrates a more fundamental consideration than that enunciated in *Taylor* or in *Duncan*. Therefore, there is no basis for according the rule in *Ham* more extensive application than those rules announced in *Duncan*, *Bloom*, and *Taylor*.

The petitioners suggest that the reliance factor in the instant case is equally as great as in *Duncan* and *Taylor*. Prior to *Ham*, there had been no indication that the specific content of voir dire questions, normally resting within the discretion of the trial judge, were subject to specific constitutional

directives. See, *e.g.*, *Commonwealth* v. *Lee*, 324 Mass. 714, 717-718 (1949).

Aldridge v. *United States*, 283 U.S. 308, 310 (1931) (and its progeny), was decided solely within this Court's supervisory jurisdiction over the lower federal courts. There was, therefore, prior to *Ham*, no basis upon which a trial judge in this Commonwealth, or in other jurisdictions,[12] could foresee a specific constitutional rule requiring that questions directed toward the specific question of racial prejudice be put to prospective jurors in every instance.

> "If there is to be a new *voir dire* rule, mandating upon request the injection of a racial prejudice issue into the case, I am not prepared to fault the trial judge for not knowing it before it was promulgated." *Ross* v. *Ristaino*, 508 F. 2d at 760 (dissenting opinion of Circuit Judge Moore).

The petitioners further suggest that to accord the expanded interpretation of *Ham* retroactive effect would necessitate the retrial of a significant number of defendants[13] and would have a substantial impact on the administration of criminal justice.

The Chief Justice of the Supreme Judicial Court has deemed the effect to be "calamitous" and has outlined the practical effect of such a decision.

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[12] *Commonwealth* v. *Brown*, 228 Pa. Super. 166, 323 A. 2d 281 (1974).

[13] The following cases are now pending in the First Circuit Court of Appeals: *Dukes* v. *Waitkevich*, No. 75-1179; *Ryles* v. *Ristaino*, No. 75-1099. (In both cases, the issuance of the writ of habeas corpus by the federal District Court has been stayed pending respondent's appeal.) In the federal District Court, the following cases are pending on petitions for writs of habeas corpus: *Bumpus* v. *Waitkevich, et al.*, Civil Action No. 74-5197-G; *Williams* v. *Vinzant*, Civil Action No. 74-2640; *Daniels* v. *Vinzant*, Civil Action No. 74-2641-S; *Lumley* v. *Hall*, Civil Action No. 75-1739-T.

"If the First Circuit's construction of the *Ham* case were given retroactive, general application, many of those convicted and incarcerated after otherwise fair trials, which had resulted in deserved convictions, would be able to come before State and Federal courts seeking relief from those convictions. While we lack precise statistics as to the number of convicted defendants potentially affected (cf. *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 418 [1966]), our experience suggests that the number is significant. Prior to any amplifying construction of the *Ham* case or any ruling of retroactivity, seven convicted defendants[6] have asked us to reverse their convictions because, they contended, failure to interrogate jurors specifically about racial prejudice abridged their rights under the due process clause. Without doubt, many more will surface if the First Circuit's construction of the *Ham* case is accepted and given retroactive effect. Each claimant would be entitled to a hearing on the issue whether he had requested that a question as to racial bias be put to potential jurors. Each claimant who had been successful in that initial stage of the hearing would then attempt to prove that the circumstances of his case fit within the enlarged *Ham* rule. The hearings and consequent appeals alone[7] would severely exacerbate the intolerable congestion of our already congested criminal sessions. The plethora of proceedings would disrupt the orderly administration of criminal justice and preclude consideration of other cases in our criminal courts. These practical considerations buttress our belief that, as a matter of constitutional principle, the *Ham* holding is properly restricted quite narrowly to the special circumstances presented by that case and similar cases." *Commonwealth* v. *Lumley*, Mass. , , 327 N.E. 2d 683, 688 (1975).

Therefore, petitioners submit that the factors which required prospective application in *DeStefano* and *Daniel* are present in the instant case and similarly require prospective application of the broad rule of *Ham* announced in *Ross* v. *Ristaino*, 508 F. 2d 754 (1974).[14]

Should this Court take a limited view of *Ham*, *i.e.*, that on the special facts of that case — where the defendant was a special target of racial prejudice and his principal defense was that the prosecution was racially motivated — there is no retroactivity issue. For this Court merely held that, under the facts of that case, refusal to ask the proposed question denied the petitioner his right to fundamental fairness as guaranteed by the Due Process Clause of the Fourteenth Amendment. No new constitutional rule was therein announced.[15]

Were this Court to hold that the First Circuit Court of Appeals' expansive interpretation of *Ham* should be given retrospective effect, the petitioners submit that its application should be limited to those cases still pending upon direct review and not extended to those cases in which judgment has become final. While the instant case was pending on a petition for writ of certiorari at the time of the narrow *Ham* decision, judgment became final after the Supreme Judicial Court reconsidered the case and affirmed, and Ross' second petition for writ of certiorari was denied.

The case is now before this Court as a result of Ross' collateral attack upon his state court conviction by way of federal habeas corpus.

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[14] See also: *Gosa* v. *Mayden*, 413 U.S. 665 (1973), holding prospective *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), which held that servicemen are entitled to indictment by grand jury and trial by civilian jury for non-service connected offenses.

[15] Compare the issues presented in *Stovall* v. *Denno*, 388 U.S. 293 (1967).

The petitioners suggest that where the judgment of the state court has become final before a new procedural rule has been promulgated, principles of comity and federalism, and the very nature of the "Great Writ" itself, must be considered in determining whether a new rule is to be applied retroactively to a state court conviction attacked collaterally upon a petition for writ of habeas corpus.

The writ of habeas corpus traditionally has been used to safeguard fundamental federally protected rights.

> "The whole history of the writ — its unique development — refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegations. State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution. . . ." *Townsend* v. *Sain*, 372 U.S. 293, 311-312 (1963).

Therefore, where the procedures utilized to convict were fundamentally fair at the time of the conviction, that is, in accordance with the commands of the Fourteenth Amendment, then it would appear to expand the scope of habeas corpus to require a reversal of a final conviction merely because of a subsequent announcement of a new "procedural due process" rule. See: *Mackey* v. *United States*, 401 U.S. 667, 682-692 (1970) (Harlan, J., concurring in part and dissenting in part).

"[N]ot every conviction based in part on a denial of a constitutional right is subject to attack by habeas corpus or § 2255 proceedings after a conviction has become final." ***Kaufman*** v. ***United States***, 394 U.S. 217, 232 (1969) (Black, J., dissenting).

To require retroactive application of a procedural rule to cases on habeas corpus ignores the traditional scope of the proceedings as a challenge to fundamental or substantial errors, and, in effect, expands the scope of review to that of direct appellate review.

Therefore, petitioners suggest that the new procedural due process rule announced in ***Ham*** should not be accorded retroactive application to cases pending on collateral attack.

" . . . given the fundamental place of federalism in the traditional conception of constitutional adjudication, it could certainly be strongly argued that the lower courts could properly follow the traditional due process approach until the time this Court made it clear that a particular Bill of Rights guarantee had been incorporated." *Desist* v. *United States*, 394 U.S. 244, 267 (1969) (Justice Harlan dissenting).

Conclusion.

For the reasons stated above, the petitioners respectfully request this Court to remand the case to the First Circuit Court of Appeals with directions to reverse its order granting the writ of habeas corpus.

Respectfully submitted,[18]

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[18] Counsel acknowledge, with gratitude, that Phyllis J. Broker of the Northeastern University School of Law has assisted the Commonwealth greatly in the preparation of this brief.

Supreme Court, U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-1216.

THEODORE RISTAINO ET AL.,
PETITIONERS,

v.

JAMES ROSS, JR.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners' Supplemental Brief.

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Petitioners' Supplemental Brief.

The petitioners would direct the attention of this Court to the change in status of two cases referred to in the petition for writ of certiorari, page 8, footnote 2.

Commonwealth v. *Lumley*, Massachusetts Supreme Judicial Court No. S-30, Slip Opinion, filed March 28, 1975 (App.). This case once again raised the issue of the scope of the decision in *Ham* v. *South Carolina*, 409 U.S. 524 (1973). In overruling the defendant's exception to the refusal of the trial judge to ask specific questions addressed to racial prejudice, the Supreme Judicial Court reaffirmed its holding in *Commonwealth* v. *Ross*, Mass. , 296 N.E. 2d 810 (1973). The court considered the expanded view of *Ham* v. *South*

Carolina, 409 U.S. 524 (1973), enunciated by the First Circuit Court of Appeals in *Ross* v. *Ristaino*, 508 F. 2d 754 (1st Cir. 1974), and declined to adopt it. The Supreme Judicial Court further considered the effect a retroactive application of the construction given to the *Ham* decision by the Court of Appeals would have upon the criminal justice system and deemed it "calamitous" (App., p. 8). The petitioners respectfully commend to the attention of this Court the attached opinion of the Supreme Judicial Court as further support for petitioners' position that this petition for writ of certiorari presents substantial questions of general importance.

Ryles v. *Ristaino*, United States District Court, District of Massachusetts, No. 75-1099. An appeal from the order of the District Court for the District of Massachusetts granting the petition for writ of habeas corpus has been docketed in the First Circuit Court of Appeals. By order of the court entered March 28, 1975, proceedings have been stayed until this Court acts upon the petition for writ of certiorari in *Ristaino* v. *Ross*, No. 74-1216.

Conclusion.

The petitioners respectfully submit that a writ of certiorari should issue to review the judgment and opinion of the First Circuit Court of Appeals.

Respectfully submitted,

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COMMONWEALTH *vs.* CLIFTON LUMLEY.

Suffolk. January 7, 1975. — March 28, 1975.

Present: Tauro, C. J., Reardon, Quirico, Braucher, Hennessey, Kaplan, & Wilkins, JJ.

Practice, Criminal, Examination of jurors, Fair trial.
Constitutional Law, Due process of law.

INDICTMENT found and returned in the Superior Court on March 7, 1972. The case was tried before *Paquet*, J.

Edward F. Haber for the defendant.
William J. Doyle, Assistant District Attorney, for the Commonwealth.

TAURO, C.J. The defendant is here on an amended bill of exceptions after conviction under an indictment charging robbery. He was also tried and found not guilty under indictments charging him with the commission of an unnatural and lascivious act and assault and battery. We overrule the exceptions.

In this case, we are required once again to consider the scope and applicability of the United States Supreme Court's holding in *Ham* v. *South Carolina*, 409 U.S. 524 (1973). [2] In *Commonwealth* v. *Ross*, Mass. (1973),^ cert. den. 414 U.S. 1080 (1973), we said that "[w]e do not believe that the *Ham* case announced a new broad constitutional principle

^ Mass. Adv. Sh. (1973) 839.

requiring that questions, designed to discover possible racial prejudice, be put to prospective jurors in all State criminal trials when the defendant is black." *Id.* at .[B] We went on to say that such questions are constitutionally mandated only when the defendant was a "special target for racial prejudice," (*id.* at)[C] as the defendant in the *Ham* case had been. Our holding in the *Ross* case has been followed consistently by this court. See *Commonwealth* v. *Ryles*, Mass. , (1973),[D] cert. den. 414 U.S. 980 (1973); *Commonwealth* v. *Rodriquez*, Mass. , - (1973);[E] *Commonwealth* v. *Bumpus*, Mass. , (1974);[F] *Commonwealth* v. *Pinckney*, Mass. , (1974).[G] Today we reaffirm that holding.

[3] The circumstances in the *Ham* case were novel. The defendant, a young black man, was well known as a civil rights activist in the small community where he had resided for most of his life. At the time of his trial, he had no prior record of convictions. His principal defense was that the local law enforcement authorities were "out to get him" because of his civil rights activities and had "framed" him on the charge of marihuana possession. With this factual background, the United States Supreme Court reversed his conviction. The court held that the trial judge in the voir dire improperly failed to examine potential jurors on the issue of racial bias. Mr. Justice Rehnquist, writing for the court, carefully limited the holding to the facts in the case: "The State having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that *under the facts shown by this record* the petitioner be permitted to have the jurors interrogated on the issue of racial bias" (emphasis supplied). *Ham* v. *South Carolina*, 409 U.S. 524, 527 (1973).

[B] *Id.* at 845.

[C] *Id.* at 846.

[D] Mass. Adv. Sh. (1973) 849, 850.

[E] Mass. Adv. Sh. (1973) 1181, 1185-1186.

[F] Mass. Adv. Sh. (1974) 477, 478.

[G] Mass. Adv. Sh. (1974) 483, 486.

Racial issues infected the entire *Ham* trial. The issues were inescapably and powerfully before the jurors. [4] Bias formed the heart of the defense. The defendant rightfully contended that bias, official and covert, was the sole cause and foundation for the prosecution. The defendant fought bias in his civil rights activities, undoubtedly known to jurors drawn from the locality. Any latent bias harbored by the jurors would likely have been activated by the case and would have defeated the defendant's efforts to achieve acquittal. When the racial issues were so salient and Ham, himself, was a special target for prejudice, the due process clause plainly entitled Ham to have the judge examine jurors for racial prejudice.

Yet, in the light of the language of Mr. Justice Rehnquist quoted above, we do not believe that the due process clause mandates such examination in every case in which there is a black defendant.[1] We adhere to our [5] prior holdings, cited

[1] We are aware that the holding in *Aldridge* v. *United States*, 283 U.S. 308 (1931), which was relied on in part in the *Ham* case, has broader implications. However, we do not believe it necessitates a broader reading of the *Ham* holding. The court in the *Ham* case observed that the *Aldridge* case arose "in a context where its [the Supreme Court's] authority within the federal system of courts allows a good deal closer supervision than does the Fourteenth Amendment" (*Ham* v. *South Carolina*, 409 U.S. 524, 527 [1973]) and that the holding "was not expressly grounded upon any constitutional requirement." (*Id.* at 526.) We believe that, if the *Aldridge* precedent has been given constitutional dimensions, it "is to be limited to special circumstances as indicated by the *Ham* case." *Commonwealth* v. *Ross*, Mass. , - (1973) (Mass. Adv. Sh. [1973] 839, 845), cert. den. 414 U.S. 1080 (1973).

above, that the defendant must be a special target for prejudice before the constitutional guaranties are invoked.

In the ordinary case, inquiries beyond the statutory questions, which raise generally the issue of bias, rest in the sound discretion of the trial judge. *Commonwealth* v. *Nassar*, 354 Mass. 249, 253 (1968). Absent the above mentioned factors which make the defendant a special target for racial prejudice, there is no constitutional compulsion to ask questions beyond the statutory questions. "[T]he statutory questions . . . [are] sufficient to insure the 'essential demands of fairness' required by the Fourteenth Amendment." *Commonwealth* v. *Ryles*, Mass. , (1973),[H] cert. den. 414 U.S. 980 (1973). However, as a practical matter, when a motion that prospective jurors be interrogated as to possible prejudice is presented, we believe the trial judge should grant the motion.[2] Such a motion, raising as it does difficult issues of jury psychology and potential injury to the [6] defendant's case, should come from the defendant himself. Before granting the motion, the trial judge should carefully ascertain that the defendant's decision to insist on specific questions regarding racial bias was a knowing and voluntary one, made with an understanding that such specific questions may activate latent racial bias in certain prospective jurors or may insult others without uncovering evidence of bias in hard-core bigots who refuse to acknowledge their prejudice.[3] If, thereafter, the defendant insists that specific questions concerning bias be asked, the judge should propound such questions to the veniremen. The decision then has

[H] Mass. Adv. Sh. (1973) 849, 851.

[2] Our information indicates that, since the *Ham* decision, such motions are being granted routinely in the Superior Court.

[3] The judge might suggest to the defendant that a desirable alternative to specific questions would be a forceful instruction to the jury which would caution jurors against bias in their deliberations.

been the defendant's to make. Granting the request for special interrogation may avoid needless appeals which lack constitutional substance under our interpretation of the *Ham* case.[4]

[7] This court's interpretation of the *Ham* case was before the United States Court of Appeals for the First Circuit recently in *Ross* v. *Ristaino*, 508 F. 2d 754 (1st Cir. 1974), an application for a writ of habeas corpus filed by the defendant in *Commonwealth* v. *Ross*. The Court of Appeals, by a divided court, did not attempt to "resolve . . . [the] ambiguity" it found in the *Ham* opinion and, for purposes of argument, accepted the requirement that the defendant be a special target for prejudice. *Id.* at 756. The court, with Judge Moore dissenting, then approved an implicit finding of the Federal District Court that "a black defendant charged with violent crimes against a white security officer would be likely to be a special target of racial prejudice." *Ibid.*

[4] The broader implications of the *Ham* case pose troubling problems for our system of criminal jurisprudence. Are black veniremen and women to be interrogated as to their possible racial prejudice against blacks or against whites? Assume a judge puts such questions to prospective jurors over a black defendant's objection. Would that constitute reversible error (following conviction)? Would not the judge be asking the prospective juror if he would believe the defendant in spite of the fact that he is black? What of the situation where two codefendants are black, and one wants the interrogation and the other does not? Does this mean that severance is automatically required? This could cause much difficulty, especially where the cases should be tried together because the defendants had engaged in a joint criminal venture or in a criminal conspiracy.

The holding in the *Ham* case can, of course, also be carried to extremes. In a recent case in the Superior Court, a defendant of Polish antecedents requested that prospective jurors be interrogated as to possible racial bias. *Commonwealth* v. *Lewinski*, Suffolk Crim. Docket No. 76961 (1974). In a recent New York case a defendant of Italian ancestry made a similar motion. *People* v. *Rubicco*, 42 App. Div. 2d (N.Y.) 719 (1973), affd. 34 N.Y. 2d 841 (1974).

[8] "[A]lthough we give respectful consideration to such lower Federal court decisions as seem persuasive," we are, of course, "not concluded by decisions of . . . [lower] Federal courts." *Commonwealth* v. *Masskow*, Mass. , (1972).[I] We cannot agree that the mere accusation of a black defendant in a crime with a white victim or the fact that the victim is a security guard constitutes "circumstances which reasonably present the issue of racial prejudice" (*Commonwealth* v. *Ryles*, Mass. , [1973],[J] cert. den. 414 U.S. 980 [1973]), and make the defendant a special target for racial prejudice. See *Commonwealth* v. *Ross*, Mass. , (1973),[K] cert. den. 414 U.S. 1080 (1973); *Commonwealth* v. *Bumpus*, Mass. (1974).[L] "We have several times indicated that the fact that the defendant is black and the victim white does not suffice to bring a case within the *Ham* rule and to require specific questions by the trial judge as to possible prejudice among the veniremen." *Commonwealth* v. *Bumpus*, *supra*, at .[M] The ethnic identities of the [9] defendant and victim, without other factors underscoring the racial elements of the case and their specific application to the defendant, are insufficient to invoke the special precautions of the *Ham* case. The victim's occupation alone is not one such factor.

It is appropriate at this point to note that the expansive construction of the *Ham* holding adopted by the United States Court of Appeals for the First Circuit would have a calamitous impact on the criminal justice systems of many States if the

[I] Mass. Adv. Sh. (1972) 1817, 1822.

[J] Mass. Adv. Sh. (1973) 849, 850.

[K] Mass. Adv. Sh. (1973) 839, 846.

[L] Mass. Adv. Sh. (1974) 477.

[M] Mass. Adv. Sh. (1974) at 478.

construction were accepted as good constitutional law and applied retroactively[S] to [10] all prior trials. Reliance on former constitutional standards, which left the specific content of voir dire questions in State courts to the trial judge, for many years was widespread in this and other jurisdictions. See, e.g., *Commonwealth* v. *Ross*, Mass. (1972),[N] judgment vacated 410 U.S. 901 (1973), affd. on rehearing Mass. (1973),[O] cert. den. 414 U.S. 1080 (1973); *State* v. *Ham*, 256 S.C. 1 (1971), revd. 409 U.S. 524 (1973). The prior case law and Supreme Court decisions gave no forewarning that certain specific questions concerning racial bias might be obligatory as a matter of Fourteenth Amendment due process. If the First Circuit's construction of the *Ham* case were given retroactive, general application, many of those convicted and incarcerated after otherwise fair trials, which had resulted in deserved convictions, would be able to come before State and

[S] We have no doubt that the limited rule announced in the *Ham* case should be given retroactive effect. In the circumstances of that case, where the defendant was a special target for racial prejudice, failure to interrogate jurors concerning racial bias materially tainted the outcome of the trial. "Where [as in the *Ham* case] the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect." *Williams* v. *United States*, 401 U.S. 646, 653 (1971) (plurality opinion. See, e.g., *Witherspoon* v. *Illinois*, 391 U.S. 510, 523, n. 22 (1968); *McConnell* v. *Rhay*, 393 U.S. 2, 3-4 (1968); *Ivan V.* v. *City of New York*, 407 U.S. 203, 204 (1972).

We strongly question whether the enlargement of the holding in the *Ham* case proposed by the First Circuit, if accepted as good constitutional law, should be accorded retroactive effect. See *Ross* v. *Ristaino*, 508 F. 2d 754 (1st Cir. 1974) (Moore, J., dissenting). Cf. *DeStefano* v. *Woods*, 392 U.S. 631 (1968); *Daniel* v. *Louisiana*, U.S. (1975) ([January 27, 1975] 43 U.S. L. Week 3415).

[N] Mass. Adv. Sh. (1972) 873.

[O] Mass. Adv. Sh. (1973) 839.

Federal courts seeking relief from those convictions. While we lack precise statistics as to the number of convicted defendants potentially affected (cf. *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 418 [1966]), our experience suggests [11] that the number is significant. Prior to any amplifying construction of the *Ham* case or any ruling of retroactivity, seven convicted defendants[6] have asked us to reverse their convictions because, they contended, failure to interrogate jurors specifically about racial prejudice abridged their rights under the due process clause. Without doubt, many more will surface if the First Circuit's construction of the *Ham* case is accepted and given retroactive effect. Each claimant would be entitled to a hearing on the issue whether he had requested that a question as to racial bias be put to potential jurors. Each claimant who had been successful in that initial stage of the hearing would then attempt to prove that the circumstances of his case fit within the enlarged *Ham* rule. The hearings and consequent appeals alone[7] would severely exacerbate the intolerable congestion of our already congested criminal sessions. The plethora of proceedings would disrupt the orderly administration of criminal justice and preclude consideration of other [12] cases in our criminal courts. These practical considerations buttress our belief that, as a matter of constitutional principle, the *Ham* holding is properly restricted quite narrowly to the special circumstances presented by that case and similar cases.

[6] See *Commonwealth* v. *Ross*, Mass. (1973) (Mass. Adv. Sh. [1973] 839), cert. den. 414 U.S. 1080 (1973); *Commonwealth* v. *Ryles*, Mass. (1973) (Mass. Adv. Sh. [1973] 849), cert. den. 414 U.S. 980 (1973); *Commonwealth* v. *Rodriquez*, Mass. (1973) (Mass. Adv. Sh. [1973] 1181 (two defendants); *Commonwealth* v. *Bumpus*, Mass. (1974) (Mass. Adv. Sh. [1974] 477); *Commonwealth* v. *Pinckney*, Mass. (1974) (Mass. Adv. Sh. [1974] 483). The instant defendant is the seventh.

[7] New trials would follow in some cases.

With this view of the law in mind, we turn now to the evidence in the instant case, before us on the defendant's amended bill of exceptions. The Commonwealth's evidence tended to show the following. On February 19, 1972, the victim, a white woman, working as a cocktail waitress, canvassed the Prudential Center area of Boston in search of new employment. Unsuccessful in her search, she was walking along Boylston Street when she was accosted by the defendant. He asked her why she looked so depressed. On being told of her failure to find a new job, he offered to help and suggested that they repair to his apartment to discuss the matter. The victim at first refused, but then acquiesced.

There was further evidence that at the defendant's apartment the two engaged in general conversation for some time. As the conversation progressed, the victim became increasingly uneasy. When she stood up to leave, the defendant began to caress her body. She protested, but was ultimately forced to disrobe and engage in unnatural acts with the defendant.

[13] The victim remained in the defendant's apartment overnight. At one point, she attempted to escape[8] and was apprehended by the defendant. He then barricaded the door with a chest. Later, the victim was again forced to engage in sexual acts with the defendant.

The following morning the victim was permitted to leave. However, before her departure the defendant searched her belongings and removed $47. This money was recovered by the police when they arrested the defendant shortly after the victim's release.

At trial, the defendant was convicted of robbery, but was acquitted of assault and battery and commission of an unnatu-

[8] The testimony regarding the "escape" conflicted in several material respects.

ral and lascivious act. Notwithstanding his acquittal on the charges involving sex and violence, the defendant argues[9] forcefully that the sexual overtones of the case present a special circumstance which entitled him to have questions concerning racial bias[10] put to the venire in the [14] voir dire. We cannot agree that the refusal of the judge to so interrogate the prospective jurors required reversal in this case.

We cannot say that the facts of this case made the defendant more a special target for racial prejudice than any other black defendant who allegedly committed a crime of violence against a white victim. This case does not present the racial issues more vividly than a case involving a "brutal and unprovoked attack" on a white security guard who "received serious, multiple stab wounds" (*Commonwealth* v. *Ross*, Mass. , [1972],[P] judgment vacated 410 U.S. 901 [1973], affd. on rehearing Mass. [1973],[Q] cert. den. 414 U.S. 1080

[9] The other exceptions taken at trial have not been argued or briefed by the defendant's counsel and are deemed waived. *Commonwealth* v. *Baldassini*, 357 Mass. 670, 679 (1970).

[10] The requested questions relating to racial bias which the trial judge refused to put to the venire were:

"2. Will you be influenced in any way, either pro or con, by the race of Clifton Lumley?"

"3. Would you be able to give a black man accused of unnatural sexual acts with white women the same benefit of the doubt that you would give to a white defendant accused of unnatural sexual acts with black women?"

"9. Do you live in an integrated neighborhood?"

"10. If Negroes moved into your neighborhood, would you be more afraid of crime than you are now?"

"11. Would you be able to give a black man accused of unnatural sexual acts with a white woman the same benefit of doubt that you would give to a defendant accused of unnatural sexual acts with a woman of his own race?"

[P] Mass. Adv. Sh. (1972) 873, 874-875.

[Q] Mass. Adv. Sh. (1973) 839.

[1973]), or a murder of [15] a white bank officer in the course of a bank robbery (*Commonwealth* v. *Bumpus*, Mass. [1974]).[R] The defendant did not allege any racial motivation on the part of arresting officers or specify any circumstances beyond the facts of the crime which would have led the jurors to think particularly of the racial context. There was no allegation or proof, as there had been in the *Ham* case, that the defendant's arrest and prosecution had been undertaken in reaction to civil rights organizing or racially provocative activities. We note here that the jury acquitted the defendant of the sexual charges which, he alleged, were highly inflammatory and potentially prejudicial. Though obviously the acquittal cannot establish the constitutional sufficiency of the voir dire interrogation, it is strong evidence that the jurors were, in fact, impartial and that the voir dire conducted by the trial judge was appropriate in these circumstances. Would the result have been the same if the judge had underscored the racial issue by putting pointed questions to the potential jurors? "[A TRIAL] judge might well conclude that specific questions would be counter-productive and serve to inject [16] racial bias into the trial rather than to remove it." *Commonwealth* v. *Bumpus*, Mass. , (1974).[S]

There is no merit in the defendant's further contention that the *Ham* case is applicable here on the ground that the key issue in the instant case was the victim's credibility. It is true that in *Commonwealth* v. *Ross*, Mass. (1973),[T] cert. den. 414 U.S. 1080 (1973), we said: "The posture of the [*Ham*] case thus placed great emphasis on the issue of the credibility of the defendant in light of his reputation as opposed to that of the

[R] Mass. Adv. Sh. (1974) 477.

[S] Mass. Adv. Sh. (1974) 477, 478.

[T] Mass. Adv. Sh. (1973) 839.

credibility of the police." *Id.* at .[U] However, a conflict of testimony alone is insufficient to bring a case within the doctrine of the *Ham* case. In *Commonwealth* v. *Pinckney*, Mass. (1974),[V] we held that the fact that "the defendant took the stand and that his credibility as opposed to that of white witnesses was the crux of the case is not enough to create special circumstances requiring that specific questions on racial prejudice be put to the venire." *Id.* at .[W] In addition, even if a [17] conflict of testimony by the black defendant and white witnesses would be sufficient to "requir[e] that specific questions on racial prejudice be put to the venire" (*ibid.*), no such conflict arose in the instant case. The defendant did not take the stand to testify. *Commonwealth* v. *Ryles*, Mass. , (1973),[X] cert. den. 414 U.S. 980 (1973). The jurors had to decide only whether they credited the testimony of the victim in the light of the other evidence.

The denial of the defendant's motion to put the special questions to the prospective jurors was not a denial of due process under the Fourteenth Amendment.

Exceptions overruled.

[U] *Id.* at 840.

[V] Mass. Adv. Sh. (1974) 483.

[W] *Id.* at 486.

[X] Mass. Adv. Sh. (1973) 849, 851.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1216

THEODORE RISTAINO, *et al.*,

Petitioners,

v.

JAMES ROSS, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1216

THEODORE RISTAINO, *et al.*,

Petitioners,

v.

JAMES ROSS, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

PRIOR PROCEEDINGS

ROSS was convicted by a trial jury in the Superior Court, Middlesex County, Massachusetts, and there is no opinion with respect to that conviction. The opinion of the Supreme Judicial Court of Massachusetts in *Commonwealth v. Ross* is reported in 1972 Mass. Adv. Sh. 873, 282 N.E. 2d 70. (App. 111) ROSS filed a

timely petition to the United States Supreme Court, Misc. #72-5119, and on January 22, 1973, Petitioner's Motion to Proceed In Forma Pauperis and Petition for Writ of Certiorari were granted, the judgment below vacated and the case remanded for further consideration in light of *Ham v. South Carolina*, 409 U.S. 524; *Ross v. Massachusetts*, 410 U.S. 901 (1973). (App. 127) Subsequently, a second opinion was rendered affirming ROSS' conviction by the Supreme Judicial Court for the Commonwealth of Massachusetts and is reported in 1973 Mass. Adv. Sh. 839, 296 N.E. 2d 810. (App. 128) ROSS again filed a timely Petition for Writ of Certiorari to the United States Supreme Court, which petition was denied on December 3, 1973, with Mr. Justices Marshall, Douglas and Brennen dissenting, *Ross v. Massachusetts*, 414 U.S. 1080 (1974). (App. 137) ROSS then filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Massachusetts. (App. 146) On June 24, 1974, the Honorable Walter Jay Skinner, after a hearing, issued a memorandum and order stating that:

> "The mandate of *Ham* is so clear, however, and the role announced is so fundamental that I have no choice but to enter the following order:
>
> The writ of habeas corpus shall issue unless within 120 days from the date this Order becomes final the Commonwealth shall have instituted proceedings to retry the petitioner in accordance with principles stated above." *Ross v. Ristaino*, 388 F. Supp. 99 at 101 (1974). (App. 151)

The Commonwealth then instituted an appeal of Judge Skinner's memorandum and order to the United States Court of Appeals for the First Circuit. (App.

155) On December 31, 1974 the Court of Appeals issued a decision affirming the granting of ROSS' Petition for Writ of Habeas Corpus and stated:

> "On these facts the District Court was not in error in concluding that '[t]he likelihood of infection of the verdict (by racial, prejudice) was at least as great as it was in *Ham*.' In effect the Court held that a black defendant charged with a violent crime against a white security officer would be likely to be a special target of racial prejudice." *Ristaino v. Ross*, 508 F.2d 754, 756 (1975). (App. 158)

The Commonwealth then filed a Petition for Writ of Certiorari with this Court which was granted on May 27, 1975 along with Respondent's Motion to Proceed In Forma Pauperis. *Ristaino v. Ross*, 95 S. Ct. 1989 (1975). On June 9, 1975, this Court granted Respondent's Motion to Appoint Counsel and Michael G. West, Esquire of Springfield, Massachusetts was appointed to represent James Ross, Jr. *Ristaino v. Ross*, 43 L.W. 3644 (June 10, 1975).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in part:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . ."

The Fourteenth Amendment to the United States Constitution provides in part:

Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Circuit Court of Appeals erred in Applying *Ham v. South Carolina*, 409 U.S. 524 (1973) to the facts as presented in *Ristaino v. Ross*, 508 F.2d 754 (1974).

2. Whether the failure to comply with the requirements of *Ham v. South Carolina*, 409 U.S. 524 (1973) constitutes reversible error without the showing of actual prejudice.

3. Whether the First Circuit Court of Appeals erred in its retroactive application of *Ham v. South Carolina*, 409 U.S. 524 (1973) to the case at bar.

STATEMENT OF THE CASE

Respondent, JAMES ROSS, JR., was convicted on three indictments (App. pp. 19, 20, 21) charging him with armed robbery, assault and battery by means of a dangerous weapon; and assault and battery with intent to murder. As a result of these convictions, ROSS received terms of 18 to 20 years for armed robbery (App. 6) 6 to 10 years for assault with a dangerous weapon (App. 17) and 18 to 20 years for assault and

battery with intent to murder (App. 12) to be served concurrently at a Massachusetts Correctional Institution.

Before trial, and prior to the impanelling of the jury, each defense counsel submitted motions to the judge which proposed questions to be asked to the prospective jurors concerning the issue of racial prejudice. (App. pp. 22-23, 24-25, 25-28).

Among those questions submitted to the judge concerning racial prejudice were the following:

Submitted by Counsel for Respondent Ross.

"5. Are there any of you who believe that a white person is more likely to be telling the truth than a black person?" (App. 23)

Submitted by Counsel for Co-defendant Roy Daniels.

"3. Do you believe that blacks have a greater propensity for violent or militant behavior than whites?

"4. Over the past years have you noticed a change in the number of crimes being committed in this city?

"6. Has it disturbed you?

"7. Do you feel this increase is due primarily to blacks in the city?

"8. Have you noticed an increased number of blacks and Puerto Ricans coming into your neighborhood?

"9. Have you been disturbed by the changes in your neighborhood?

"10. Have you thought of moving out of it?" (App. 24)

Submitted by Counsel for Co-defendant James Williams.

"10. Would the fact that the defendant is black make it more difficult for you to render a verdict in his favor than if he were white?

"11. If it develops in this case that testimony of black witnesses contradicts the testimony of white witnesses, other things being equal, would you give the testimony of black witnesses and white witnesses equal credit?

"12. Do you have any feelings of prejudices against organizations which support civil rights for members of the black race, such as the National Association for the Advancement of Colored People (NAACP) or the Congress for Racial Equality (CORE) or the Black Panther Party? (App. 26)

"13. Have demonstrations and other activities by blacks in various parts of the United States over the past few years left you with a feeling of hostility toward blacks?

"14. Have you felt in your own mind that black leaders are 'going too far' in their struggle for equal rights? (App. A p. 55)

"15. Have you had an experience involving a black person which left you with a feeling of prejudice concerning members of the black race?

"16. Would the fact that the defendant is a member of a minority make it more difficult for you to consider the facts objectively and render a verdict in his favor than if he were not a member of such group?

"17. Are there any members of this jury who possess any prejudices with respect to the nationality of any one of the defendants which would prevent you from deciding this case solely on the evidence produced at the trial?

"18. Do you have any feelings either for or against persons of the black race who wear the Afro style haircut and long sideburns?

"19. Are there any members of this jury who possess any prejudice with respect to black people who are involved in causes seeking liberation and justice for black people which would prevent you from deciding this case solely on the evidence produced at the trial?" (App. 27)

These motions were made and denied (App. pp. 23, 25, 28). The reason for the judge's refusal to ask any of the proposed questions is contained in the following colloquy:

THE COURT: "All right. I am going to approach it, as I have said, with all due respect to the problems, and they are important problems which you gentlemen have raised with these several questions which you have asked the Court to put in addition to the usual statutory inquiry, and without going into details as to my reasons, I feel that no purpose would be accomplished by asking such questions in this instance.

There are a number of reasons why I take that position, but they are sound reasons, and the reason I asked you in is that I thought from something Mr. Donnelly said, he might have wanted on the record something which was peculiar to this case, or peculiar to the circumstances which we are operating under here which perhaps he didn't want to say in open court.

Is there anything peculiar about it, Mr. Donnelly?

MR. DONNELLY:[1] No, just the fact that the victim is white, and the defendants are black.

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[1] Mr. Donnelly was counsel for Roy Daniels; Mr. Owens was counsel for James Williams and Mr. Newman was counsel for James Ross, Jr.

THE COURT: This, unfortunately, is a problem with us, and all we can hope and pray for is that the jurors and all of them take their oaths seriously and understand the spirit of their oath and understand the spirit of what the Court says to them—this Judge anyway—and I am sure all Judges of this Court—would take the time to impress upon them before, during and after the trial, and before their verdict, that their oath means just what it says, that they are to decide the case on the evidence, with no extraneous considerations.

I believe that that is the best that can be done with respect to the problems which—as I said, I regard as extremely important, but at the same time, my attitude—

MR. DONNELLY: There is only one thing. The only reference I would make to the facts in this case—the victim being white, and that he was a security guard in uniform and acting as a policeman.

* * *

MR. OWENS: In behalf of James Williams, I have various questions before the Court right now, as to impartiality, and I understand the Court's position, but I would request the Court to just make general inquiry of the entire panel because whenever you have a situation involving black and white, by way of witnesses, a black witness testifying, and black, as to whether or not these jurors are impartial—

THE COURT: Let me say, again with the greatest respect for the problem, which is an acute problem, and always will be an acute problem in the courtroom and in the trial of a case involving possible racial prejudice, but one of the things that I say, and it is not the complete reasoning process that I apply to it in terms of orderly and fair

administration of the Court, but one of the things I say is that I would be simply astonished if I ever asked a juror, or a group of jurors, or ever heard a lawyer ask a group of jurors if they are white, 'Are you biased against black,' if they are white, or if they are black, 'are you biased against white.' I would be simply astonished if I had an affirmative answer. The man who has the disease of bias would be the last one that would admit it.

MR. OWENS: Your Honor, just recently I tried that civil rights case before Judge Julian which lasted four weeks, and some of the same questions we asked the entire panel, and I think 20 raised their hands when the Judge asked them certain questions, if they were biased or prejudiced.

THE COURT: I am astonished at that. It is contrary to all of the experience that I have had.

MR. DONNELLY: I tend to agree with you that people like to be good, and racism is bad, but if you ask people in the community, 'Can you be impartial?' they will say they can be. The thrust of these questions is designed to help the jurors as well as the Court to bring out within themselves the fact that they might not have considered it themselves. (App. pp. 29-31).

Instead of asking any of the proposed questions or any other question of the court's choosing as to racial prejudice the court addressed the following questions to the jurors as required, at that time, by Massachusetts General Laws, Chapter 234, Section 28:

> "If any of you are related to the defendant or the victim?
>
> "If you have any interest in this case?
>
> "If you have expressed or formed an opinion or are sensible of any bias or prejudice?"

In addition, the court asked two additional questions; one dealing with whether the jurors or their relations had done police work[2] and the other dealing with whether the jurors would be seriously inconvenienced if they were sequestered for the duration of the trial.

Prospective jurors were excused by the court because of their answers to these questions.[3] At the close of the impanelling of the jury, ROSS, as well as the other two co-defendants, had exhausted their peremptory challenges whereas the Commonwealth had thirty-one peremptory challenges left. (App. 102, *Commonwealth v. Ross*, App. 128-136 AT 134N.9).

Moreover, prior to the time the prospective jurors were asked the above-mentioned questions the trial judge discussed with each prospective jury panel their obligation to render a fair and impartial verdict based only on the evidence. However, not once during the trial judge's lengthy soliloquy to each panel of prospective jurors did he directly confront the issue of racial prejudice. Rather, he spoke in general terms appealing to the prospective jurors' "intellect and conscience" (App. 37).

ROSS' final deliberating jury contained ten (10) whites and two (2) blacks (*Commonwealth v. Ross*, App. pp. 128-136 AT 134). On appeal, ROSS assigned

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[2]Question: "Are you presently, or have you in the past worked for a police department or a District Attorney's office, or do you have any relative or relatives who is or was engaged in such work?" (App. 38).

[3]Seventeen jurors were excused; two because of admitted prejudice (App. pp. 42, 55) and fifteen because they had already formed an opinion. (App. pp. 40, 59, 65, 75, 76, 77, 77, 86, 87, 87,89,97,98, 98, 99-100).

as error the refusal of the trial judge to examine the jurors with respect to racial prejudice and argued that such refusal violated his right to a fair and impartial jury. (App. 105) The Supreme Judicial Court affirmed ROSS' conviction. Petitioner then filed a timely Petition for a Writ of Certiorari to this Court which was granted, judgment vacated and case remanded for further consideration in light of *Ham v. South Carolina*. After rehearing the Supreme Judicial Court again affirmed ROSS' conviction. ROSS again filed a timely Petition for a Writ of Certiorari to the United States Supreme Court which petition was denied on December 3, 1973, in which three Justices in a lengthy opinion dissented. (App. pp. 137-142). ROSS then filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Massachusetts which petition was conditionally granted on June 24, 1974, (App. pp. 151-154). An appeal by the Commonwealth of Massachusetts was taken from the conditional granting of ROSS' Petition for Writ of Habeas Corpus to the United States Court of Appeals for the First Circuit which affirmed the granting of ROSS' Petition. *Ristaino v. Ross*, 508 F.2d 754 (App. pp. 158-173). The Commonwealth then filed a Petition for Writ of Certiorari to this Court which was granted, on May 27, 1975, together with Respondent's Motion to Proceed In Forma Pauperis. *Ristaino v. Ross*, 95 S. Ct. 1989 (1975).

SUMMARY OF ARGUMENT

I. The judgment of the First Circuit in *Ross* is in conformity with this Court's decision in *Ham v. South*

Carolina, 409 U.S. 524 (1973). The "special target" doctrine of the Supreme Judicial Court for the Commonwealth of Massachusetts does not face the reality of our times and places an undue burden on the defendant to show that he is such a "special target." The doctrine advanced by the Supreme Judicial Court for the Commonwealth of Massachusetts is also unsupported by this Court's decision in *Aldridge v. U.S.*, 238 U.S. 308 (1931), and *Ham*, as well as the numerous cases upon which this Court relied in deciding *Aldridge* and *Ham*.

Moreover, since *Ham* was decided, all Courts save three have held that failure to propound questions to prospective jurors as to racial prejudice, when requested to do so by a black criminal defendant, is a violation of Constitutional dimensions. Respondent also asserts that no conflict exists between any of the Circuit Courts of Appeals which have thus far decided the issue.

II. The failure of the trial judge to examine the prospective jurors as to racial prejudice in the case at bar is reversible error without the need to show actual prejudice.

The Commonwealth of Massachusetts may regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. The rule of *Ham* is basic to a fair and impartial trial, and therefore a fundamental requirement of due process.

III. The First Circuit In *Ross* Did Not Err In Holding That *Ham v. South Carolina*, 409 U.S. 524 (1973), Is To Be Given Retroactive Effect.

A. Ample support for the inference that this Court implicitly decided that *Ham* applied to the case at bar when it summarily vacated the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts and remanded the case to that Court for reconsideration in light of *Ham*, is found in the cases of *Fuller v. Alaska*, 393 U.S. 80 (1968), *Desist v. U.S.*, 394 U.S. 244 (1969), and *Tehan v. U.S. ex rel Shott*, 382 U.S. 406 (1966).

B. For retroactivity purposes, in applying the three prong test of *Stovall v. Denno*, 388 U.S. 293 (1967), foremost among the factors is the purpose of the new Constitutional rule. The major purpose of the rule of *Ham* is to overcome an aspect of the criminal trial that substantially impairs its truth finding function, therefore *Ham* should be accorded retroactive effect. Furthermore, *Daniel v. Louisiana*, 420 U.S. 31 (1975), and *DeStefano v. Woods*, 392 U.S. 631 (1968) are distinguishable from the case at bar and should not be controlling. In both *Daniel* and *DeStefano*, problems of justified reliance by state officials on past decisions of this Court, and the significant effect upon the administration of justice, warranted against their retroactive application. Such problems are not present in the case at bar.

C. The First Circuit's retroactive application of *Ham* should not be limited to cases still pending on "direct review." Any distinction for retroactivity purposes between cases on "direct review" and those on "collateral attack" is arbitrary and unreasonable, supported by neither law nor logic.

Moreover, the value of finality in criminal judgments does not outweigh the interest of each prisoner in the vindication of his constitutional rights.

IV. Even if *Ham v. South Carolina*, 409 U.S. 524 (1973) did not enunciate a new constitutional rule of universal applicability, this Court should now announce such a rule in *Ross*.

ARGUMENT

I.

THE JUDGMENT OF THE COURT BELOW UPHOLDING RESPONDENT ROSS' RIGHT TO HAVE THE TRIAL JUDGE EXAMINE PROSPECTIVE JURORS WITH RESPECT TO RACIAL PREJUDICE IS IN CONFORMITY WITH THIS COURT'S DECISION IN *HAM V. SOUTH CAROLINA*, 409 U.S. 524 (1973).

On December 31, 1974, the United States Court of Appeals for the First Circuit affirmed a decision of the United States District Court for the District of Massachusetts granting ROSS' Petition for Writ of Habeas Corpus and declaring that the trial judge's failure to specifically inquire of the prospective jurors as to racial prejudice rises to a level of a constitutional violation requiring ROSS' release or retrial. The First Circuit appears to limit its decision to situations which involve a black criminal defendant charged with a violent crime. They state:

> "On these facts the District Court was not in error in concluding that '[t]he likelihood of infection of the verdict (by racial prejudice) was at least as great as it was in *Ham*. In effect the court held that a black defendant charged with violent crimes would be likely to be a special target of racial prejudice." (App. pp. 158-171 AT 162).

On June 24, 1974, the Honorable Walter Jay Skinner, Judge for the United States District Court for the District of Massachusetts, issued a memorandum and order granting ROSS' Petition for Writ of Habeas Corpus based upon the fact that the trial judge erred in not specifically calling to the attention of the prospective jurors the issue of racial prejudice (App. pp. 151-154 AT 153). Judge Skinner's ruling was made despite the otherwise exemplary conduct of the trial judge and despite the respect which the federal courts owe to decisions of the highest court of a state. He said with regard to *Ham v. South Carolina* that its true significance is to extend the rule in *Aldridge* to state court trials (App. pp. 151-154 AT 153). However, in addition to Judge Skinner concurring with Justices Marshall, Douglas and Brennen that the facts in *Ross* are "strikingly similar" to those of *Aldridge v. United States*, 283 U.S. 308 (1931) he said in rendering his opinion in favor of ROSS that:

> "The mandate of *Ham* is so clear, however, and the rule announced is so fundamental that I have no choice but to enter the following order." (App. pp. 151-154 AT 154).

On January 17, 1973, this Court decided the case of *Ham v. South Carolina*, 409 U.S. 524, 93 S. Ct. 848, 35 L.Ed.2d 46 (1973). This Court held pursuant to the Due Process Clause of the Fourteenth Amendment, that a black defendant in a state court criminal proceeding is entitled to have the trial judge make inquiry of the prospective jurors as to racial prejudice. Not to do so is a reversible error. 409 U.S. 524, 93 S. Ct. 848, 850 35 L.Ed.2d 46 (1973).

The Supreme Judicial Court for the Commonwealth of Massachusetts in its decision in *Commonwealth v. Ross,* 1973 Adv. Sh. 839, 296 N.E.2d 810 upheld the trial judge's refusal to ask the following question to the prospective jurors which was submitted by counsel for Respondent ROSS:

> "Are there any of you who believe that a white person is more likely to be telling the truth than a black person?"

The Supreme Judicial Court upheld the trial judge's refusal since it believed that *Ham* was to be limited to its facts and that unless ROSS could show that the was a "special target for racial prejudice," the trial judge was not constitutionally required by *Ham* to specifically interrogate the prospective jurors as to racial prejudice.[4]

It is Respondent ROSS' assertion that the Supreme Judicial Court erred in its interpretation of the decision in *Ham v. South Carolina* as well as its affirmation of his conviction and that this Court should affirm the decision of the First Circuit Court of Appeals.

The United States Supreme Court in its decision in *Ham v. South Carolina, supra,* stated that the constitutional stature of the inquiry into racial prejudice is derived from:

> "... the firmly established precedent of *Aldridge* and the numerous state cases upon which it relied and from the principal purpose as well as from the language of those who adopted the Fourteenth Amendment."[5]

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[4] 1973 Adv. Sh. 839, ____ 296 N.E. 2d 810, 816.

[5] 409 U.S. 524, ____, 93 S.Ct. 848, 851, 35 L.Ed. 46, ____. See also *Ross v. Ristaino et al* (App. pp. 151-154 AT 152).

The opinion, written by Mr. Justice Rehnquist, for the unanimous Court in *Ham* clearly indicates that the rationale for its decision was based upon the purpose and foundation of the Fourteenth Amendment which was to stop invidious discrimination based on racial prejudice.[6] Because of the historical basis of the Fourteenth Amendment to eliminate racial prejudice this Court has recognized that racial prejudice is a paramount factor to be taken into account in criminal proceedings. Nothing in the *Ham* opinion or the opinions of the district and circuit courts and nothing in the Fourteenth Amendment supports the conclusion that protection is to be limited to "special targets for racial prejudice." The report of the National Advisory Commission on Civil Disorders (1968) commonly referred to as the Kerner Commission Report recognizes the prevalence of racism in our society when it states:

> "Race prejudice has shaped our history decisively in the past; it now threatens to do so again. White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II." (Page 91)

No one can doubt the validity of this statement. In fact, Mr. Justice Marshall, with whom Mr. Justice Douglas and Mr. Justice Brennen joined, dissenting in the denial of the Second Petition of Certiorari filed by ROSS states:

> "Finally, to say that petitioner is not a potential target of racial prejudice would be to ignore as judge what we must all know as men. That petitioner was tried in Boston, Massachusetts,

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[6] ID at 850.

while Gene Ham was tried in Florence, South Carolina, is of no consequence. Racial prejudice is a cultural malady that has shaped our history as a nation. It is a cancer of the mind and spirit which breeds as prolifically in the industrial cities of the North as in the rural towns of the South." (App. pp. 137-142 AT 142).

ROSS asserts that to limit the voir dire as to racial prejudice only to "special circumstances"[7] where the defendant is found to be a "special target" for racial prejudice is not to face the reality of our times and in addition to place an undue burden on the defendant to show that he is such a "special target."

As previously mentioned, the decision in *Ham* relied on "the firmly established precedent of *Aldridge* and the numerous state cases upon which it relied". *Aldridge v. United States*, 238 U.S. 308 (1931), concerned a Negro criminal defendant who was alleged to have murdered a white policeman. *Aldridge* did not deal with a black defendant who was a "special target" for racial prejudice and no other factors were shown to be present when the United States Supreme Court reversed his conviction. In fact, Mr. Justice Marshall states:

> "The *Aldridge* Court was not concerned with whether petitioner was unpopular in the community, a special target of prejudice—but rather with the potential racial 'bias of the particular jurors who are to try the accused.' 283 U.S., at 314. The Court did not rely on any particular circumstances to justify its requirements other than the fact that 'the possibility of prejudice (against Negroes) is (not) so remote as to justify

[7] 1973 Adv. Sh. 839, 296 N.E. 2d 810, 816.

> the risk in forbidding the inquiry.' Ibid. Nor did the Court purport to limit its holding to any region because the 'question is not . . . the dominant sentiment of the community . . .' Ibid. 'In *Ham*, this Court reaffirmed its commitment to the holding of Aldridge and clarified its constitutional underpinnings. The Court emphasized the compelling nature of an inquiry into racial prejudice—the principal target of the Fourteenth Amendment.' " (App. pp. 137-142 AT 140).

In *Aldridge* numerous cases are cited which this Court in *Ham* cites with approval in which there were no special circumstances, other than the fact that the defendant was a Negro, to require reversal of the defendant's conviction due to the failure of the trial judge to inquire about any racial prejudice the prospective jurors might entertain.

Pinder v. State, 27 Fla. 370, 8 So. 837 (1891) was a case where the defendant, a Negro, was accused of murder. The lower Circuit Court refused to propound the following question to the prospective jurors:

> "Could you give the defendant, who is a negro, as fair and impartial a trial as you could a white man, and give him the same advantage and protection as you would a white man upon the same evidence?"

The Supreme Court of Florida held it was reversible error not to ask the above question. This case presents no special circumstances other than the fact that the defendant was a Negro.

In *Hill v. State*, 112 Miss. 260, 72 So. 1003 (1916) where the accused, a Negro, was charged with murder of another Negro, all witnesses except one was Negro. Counsel for the defendant propounded the following

question to a prospective juror which the lower Court held to be incompetent:

> "Mr. Dillard, have you got any prejudice against the negro, as a negro, that would induce you to return a verdict on less slighter evidence than you would return a verdict of guilty against a white man under the same circumstances?"

The Supreme Court of Mississippi reversed the appellant's conviction and stated:

> ". . . how else could appellant have guarded against race prejudice figuring in the determination of his trial than by subjecting the jurors on their voir dire examination to a line of questioning such as was presented to the Court in this instance. It is only by asking questions of the nature of the above question that it is possible for counsel to elicit from the venireman whether or not there exists in his breast race prejudice, perhaps calculated to do the defendant irreparable injury in the trial of his case", 112 Miss. 260, 265.

In *State v. McAfee*, 64 N.C. 339 (1869) the Supreme Court of North Carolina reversed the rape conviction of a colored man because of the refusal of the trial judge to ask the prospective jurors if:

> ". . . he believed he could, as a juror, do equal and impartial justice between the State and a colored man".

No special circumstances were present in this case to influence the North Carolina Court to reverse Mr. McAfee's conviction other than the fact that the defendant was a colored man.

It is clear from this Court's decisions in *Aldridge* and *Ham* and the numerous cases upon which it relied in making its decision, that the " special target" doctrine

advanced by the Supreme Judicial Court for the Commonwealth of Massachusetts, in the case at bar, finds no support. In fact Mr. Justice Marshall speaking for himself and Mr. Justice Douglas and Mr. Brennen, dissenting from the Court's denial of ROSS' Petition for Certiorari states in regard to the Supreme Judicial Court's decision that *Ham* was to be limited to those defendants who were a "special target for racial prejudice" that:

> "This distinction is supported by neither logic nor precedent." (App. pp. 137-142 AT 139)

This Court in *Ham* has stated that in addition to the general question required by statute to be put to the prospective jurors an additional question or questions must be put to the veniremen,

> "sufficient to focus the attention of prospective jurors to any racial prejudice they might entertain."[8]

Respondent ROSS asserts that the trial judge in the case at bar did not "focus the attention" of the veniremen as to the issue of racial prejudice. ROSS admits the trial judge was concerned about the issue of racial prejudice and regarded it as an important one. Respondent further admits that the trial judge did speak at length to each panel of prospective jurors about their duty and obligation to render a fair and impartial verdict. However, not once during the trial judge's soliloquy to the veniremen did he directly confront the issue of racial prejudice.

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[8] 409 U.S. 524, ____, 93 S.Ct. 848, 35 L.Ed. 2d 46, ____ (1973).

It is ROSS' contention that the only way to "focus the attention of the prospective jurors as to any racial prejudice they might entertain" is to ask specific questions regarding racial prejudice. The First Circuit, in the case at bar, supports ROSS' assertion. (App. pp. 158-171 AT 163) Additionally, Judge Skinner of the United States District Court for the District of Massachusetts recognized this fact when in his opinion in *Ross* he quotes from the case of *People v. Reyes.*, 5 Cal. 347, 349 which is cited by Chief Justice Hughes in *Aldridge* and concludes:

> "As the juror best knows the condition of his own mind, no satisfactory conclusion can be arrived at, without resort to himself. Applying this test then, how is it possible to ascertain whether he is prejudiced or not unless questions similar to the foregoing are propounded to him." (App. pp. 151-154 AT 153).

Moreover, the Seventh Circuit in *United States v. Dellinger*, 472 F.2d 340, 367 (1972) spoke to this point by stating:

> "The government's position must rest upon an assumption that a general question to the group whether there is any reason they could not be fair and impartial can be relied on to produce a disclosure of any disqualifying state of mind. We do not believe that a prospective juror is so alert to his own prejudices."

It is the essence of fundamental fairness and right to an impartial jury which has led this Court to pronounce that it is imperative to allow the specific question regarding racial prejudice or bias to be asked on voir

dire examination.[9]

This Court in *Swain v. Alabama* notes that the influence of race on jurors is widely explored during voir dire and "that the fairness of trial by jury requires no less." 380 U.S. 202 AT 221 (1965).

> "Merely going through the form of obtaining juror's assurances of impartiality is insufficient . . . (w)hether a juror *can* render a verdict based solely on evidence adduced in the courtroom *should not be adjudged on that juror's own assessment of self-righteousness without something more.*" (Emphasis in original.)[10]

Calling for purely subjective responses to general questions is ineffective to test impartiality, and "the defendant in a criminal case has the 'right to probe for the hidden prejudices of jurors.' "[11]

However, the trial judge in the instant case instead of asking any of the defendants' proposed questions as to racial prejudice inquired in a general manner as to bias and prejudice, appealing solely to the jurors' "intellect and conscience" (App. 37). It is obvious that the

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[9] *Aldridge v. United States*, 283 U.S. 308 (1931); *Swain v. Alabama*, 380 U.S. 202 (1965); *Dennis v. United States*, 339 U.S. 162 (1950).

[10] *Silverthorne v. United States*, 400 F.2d 627, 638-639 (9th Cir. 1968); *United States v. Carter*, 440 F.2d 1132 (6th Cir. 1971).

[11] *Silverthorne v. United States* ID, at 640; See ABA Project on Standards For Criminal Justice, Fair Trial and Free Press, § 2.3, 126-127 (approved draft 1968); See also W. Forsyth, Trial By Jury 175 (1852); Devlin, Trial By Jury 30-31 (1956). Note, Community Hostility and The Right to Impartial Jury, 60 Colum. L. Rev. 349, 354 (1960).

questions actually asked by the court were ineffective in uncovering the possibility of racial prejudice. In fact, of all the prospective jurors questioned only two were excused because of admitted prejudice (App. 42, 55).

Federal Courts have consistently held that a criminal defendant has a right to examine jurors specifically with respect to racial prejudice,[12] and such questions have been widely approved by state courts.[13]

Since *Ham* was decided on January 17, 1973, all Courts[14] save three[15] have held that failure to propound

[12]*United States v. Carter*, 440 F.2d 1132 (6th Cir. 1971); *United States v. Gore*, 435 F.2d 1110 (4th Cir. 1970); *King v. United States*, 362 F.2d 968 (D.C. Cir. 1966); *Frasier v. United States*, 267 F.2d 62 (1st Cir. 1959); *Smith v. United States*, 262 F.2d 50 (4th Cir. 1959); *United States v. Dennis*, 183 F.2d 201, 227, n.35 (2d Cir.), aff'd 341 U.S. 494 (1951); *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972).

[13]*Gholston v. State*, 221 Ala. 556, 130 So. 69 (1930); *State v. Higgs*, 143 Conn. 138, 120 A.2d 152 (1956); *Pinder v. State*, 27, Fla. 370, 8 So. 837 (1891); *Herndon v. State*, 178 Ga. 832, 174 S.E. 597 (1934); *State v. Jones*, 175 La. 1014, 144 So. 899 (1932); *Giles v. State*, 229 Md. 370, 183 A.2d 359 (1962); *Owens v. State*, 177 Miss. 488, 171 So. 345 (1930); *State v. Pyle*, 343 Mo. 876, 123 S.W. 2d 166 (1938); *Johnson v. State*, 88 Neb. 565, 130 N.W. 282 (1911).

[14]See *Ristaino v. Ross*, 508 F.2d 754 (1st Cir. 1974); *United States v. Robinson*, 485 F.2d 1157 (3rd Cir. 1973); *Featherston v. United States*, 491 F.2d 96 (5th Cir. 1974) cert. den. 417 U.S. 971 (1974); *United States v. Ross*, 477 F.2d 551 (6th Cir. 1973); *United States v. Powers*, 482 F.2d 941 (8th Cir. 1973) cert. den 415 U.S. 923 (1974); *United States v. Booker*, 480 F.2d 1310 (7th Cir. 1973); *United States v. Robinson*, et al, 475 F.2d 376, AT 381 (D.C. Cir. 1973).

[15]See *United States v. Walker*, 491 F.2d 236 (9th Cir. 1974), *cert. den.* 416 U.S. 990 (1974) discussed in detail *infra; Commonwealth v. Brown*, 228 Pa. Super. 166, 323 A.2d 281 (1974); *Commonwealth v. Lumley*, 1975 Adv. Sh. 751 (Supreme Judicial Court, Massachusetts, April 7, 1975).

questions to prospective jurors as to racial prejudice, when requested to do so by a black criminal defendant, is a violation of constitutional dimensions. Of these three courts only one United States Court of Appeals has held that *Ham* is to be limited to its facts and requires a prior showing that the defendant is a "special target for racial prejudice" before a constitutional right is involved. However, this case, *United States v. Walker*, 491 F.2d 236 (9th Cir. 1974) *cert. den.* 416 U.S. 990 (1974) is distinguishable from the case at bar in several material respects:

> *FIRST, Walker* dealt with the crime of uttering a forged check whereas *Ross* dealt with the assault by a black man against a white quasi police officer which fact ROSS asserts makes his case, per se, one with racial overtones. It is important to note that the First Circuit in the case at bar limited its holding to violent crimes and did not render any opinion as to crimes such as that involved in *Walker*.[16]
>
> *SECOND*, the Court in *Walker* states that its facts are distinguishable from both *Aldridge* and *Ham*, whereas the facts in *Ross* are "strikingly similar" to those in *Aldridge* (See App. pp. 151-154 AT 154 and App. pp. 137-142 AT 142).
>
> *THIRD*, in reaching its conclusion the *Walker* Court relied heavily on the Supreme Judicial Court's decision in *Commonwealth v. Ross*, 296 N.E. 2d. 810 (1973), whereas that decision has been overruled by both the Honorable Walter Jay Skinner (App. pp. 151-154) and the United States Court of Appeals for the First Circuit (Petitioners pp. pp. 158-171) which decisions the *Walker* Court did not have the benefit of in making its decision.

[16]*Ristaino v. Ross*, 508 F.2d 754, AT 756 (1st Cir. 1974).

FOURTH, in *Walker* the Court agrees that asking prospective jurors questions as to racial prejudice would be preferable but holds that asking these questions did not rise to the level of an abuse of discretion *particularly* "in view of the fact that no objection was made to the Court's failure to ask the questions" (491 F.2d. 236, 239). Whereas ROSS strenuously objected to the trial judge's failure to ask his propounded questions or those of his co-defendants and the trial judge noted ROSS' exception to his failure to do so.

The case of *United States v. Walker* is clearly distinguishable from *Ross* and should not be controlling on this Court's decision. In fact, Respondent asserts that *Walker* is consistent with First Circuit's decision and, therefore, no conflict exists between any of the Circuit Courts of Appeal which have thus far decided this issue.

II.

FAILURE OF THE TRIAL JUDGE TO EXAMINE THE PROSPECTIVE JURORS REGARDING RACIAL PREJUDICE IS REVERSIBLE ERROR WITHOUT THE NEED TO SHOW ACTUAL PREJUDICE.

Petitioners assert that this Court should reestablish a judicial balance between federal and state courts by requiring a showing of real prejudice before the federal court may intervene. (See Brief for Petitioners at 29, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).) Respondent disagrees. In *Snyder*, the Court was concerned with whether the bare viewing of the

scene of the crime by the jurors in the absence of the accused was a denial of due process. The Court based its decision upon the fact that

> "Nowhere in the decision of this Court is there a dictum, and still less a ruling that the 14th amendment assures the privilege of presence when presence would be *useless*, or the *benefit but a shadow*" *Snyder, supra*, at 106. (Emphasis Added)

Far from being useless, and the benefit but a shadow,

> "Petitioners acknowledge that allowing a black defendant to ask questions directed to racial prejudice of the prospective jurors may aid in determining the impartiality of the fact finders." (See Brief for Petitioners at 34.)

Therefore, the considerations which controlled the Court's decision in *Snyder* are inapposite to the case at bar. Furthermore, in *Snyder*, this Court was careful to point out that

> "the Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness *unless* in doing so it offends some principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" *Snyder, supra*, at 105 (Emphasis Added).

Respondent suggests that the rule of *Ham* is so basic to a fair trial that its infraction is reversible error without the need to show actual prejudice, and may not be treated as harmless error. Cf. *Payne v. State of Arkansas*, 356 U.S. 560 (1958) (coerced confession); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Tumey v. State of Ohio*, 273 U.S. 510 (1926) (impartial judge).

This Court has in the past held that

> "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.". *Chapman v. State of California*, 386 U.S. 18, 24 (1967).

The burden of proof is on the Commonwealth to affirmatively show that any error was harmless beyond a reasonable doubt. See *Commonwealth v. MacDonald*, Mass. Adv. Sh. (1975), 2390, 2395, *Commonwealth v. Robichaud*, 358 Mass. 300, 302 (1970).

This Court in the case of *Peters v. Kiff*, 407 U.S. 493 (1972) has expressed in clear terms that:

> "A fair trial in a fair tribunal is a basic requirement of due process." (Citing *In re Murchison*). (AT 501)

While the *Kiff* decision dealt primarily with the systematic exclusion of blacks from the jury, and raised issues of due process and equal protection, the underlying implication and major thrust of the resolution of the problem was that the right to trial by an impartial jury requires that the jury be selected and comprised of jurors who are capable of rendering a verdict based on the evidence, unfettered by any possible prejudice or bias. This Court emphasized on page 501 that:

> "Long before this Court held that the Constitution imposes the requirement of jury trial on the states, it is well established that the due process clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law." and also that:
>
> "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." (AT 502)

There is no doubt that the possibility of jurors being racially prejudiced existed and therefore would play a significant role in the disposition of the case at bar. In fact, one prospective juror in the *Ross* case admitted prejudice against the defendants because of their race and another juror admitted prejudice (unspecified) against the defendants and were excused (App. 151).

In the case of *United States v. Carter*,[17] 440 F.2d 1132 (1971), the Sixth Circuit dealt with the exact issue as was presented in *Aldridge* and in the present case. In holding that the trial judge committed reversible error by refusing to permit Appellant's counsel to inquire on voir dire examination whether any of the prospective jurors were prejudiced against black people, the court referred to the language of *Aldridge* and stated:

> "The argument is advanced on behalf of the government that it would be detrimental to the administration of law in the Courts of the U.S. to allow questions to jurors as to racial or religious prejudices. We think it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualifications were barred. No surer way could be devised to bring the process of justice into disrepute." (at 1133 citing *Aldridge v. United States* 283 U.S. 308 AT 313)

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[17]In *United States v. Carter*, 10 of 12 jurors were white as in the present case.

It is up to the trial judge to assure that no prejudice has been fostered. In order to assure the impartiality of the jury, it has been widely held that the trial judge *must* allow probing questions to jurors on voir dire as to the harboring of a racial bias. The main point is that "the denial or impairment of the right to challenge the jury has been described as *'reversible error without a showing of prejudice'* "[18] (Emphasis Supplied). It should be noted that cases which have construed this particular issue have consistently held that such error is reversible, for the question is one of denying the Respondent his constitutionally guaranteed right to an impartial jury.[19] Furthermore, in the *Kiff* case this Court states:

[18]*Swain v. Alabama*, 380 U.S. 202, 219 (1965). See also *U.S. v. Booker*, 480 F.2d 1310, (7th Cir. 1973).

[19]*U.S. v. Booker*, 480 F.2d 1310, (7th Cir. 1973); *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972). *United States v. Dennis*, 183 F.2d 201, 227 N.35 (2nd Cir.) aff'd. 341 U.S. 494 (1951); *Bailey v. United States*, 53 F.2d 982 (5th Cir. 1931); *Smith v. United States*, 262 F.2d 50 (4th Cir. 1958); *King v. United States*, 362 F.2d 968 (1966); *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968); *United States v. Carter*, 440 F.2d 1132 (6th Cir. 1971); *United States v. Gore*, 435 F.2d 1110 (4th Cir. 1970); *Frasier v. United States*, 267 F.2d 62 (1st Cir. 1959); *Kiernan v. Van Schaik*, 347 F.2d 775 (3rd Cir. 1965); *Spells v. United States*, 263 F.2d 609 (5th Cir. 1959); *Brown v. United States*, 338 F.2d 543 (1964); *Gholston v. State*, 221 Ala. 556, 130 So. 69 (1930); *State v. Higgs*, 143 Conn. 138, 120 A.2d 152 (1956); *Pinder v. State*, 27 Fla. 370, 8 So. 137 (1891); *Herndon v. State*, 178 Ga. 832, 174 S.E. 597 (1934); *State v. Jones*, 175 La. 1014, 144 So. 899 (1932); *Giles v. State*, 229 Md. 370, 183 A.2d 359 (1962); *Owens v. State*, 177 Miss. 488, 171 So. 345 (1930); *State v. Pyle*, 343 Mo. 876, 123 S.W. 2d 166 (1938) *Johnson v. State*, 88 Neb. 565, 130 N.W. 282 (1911); *People v. Decker*, 157 N.Y. 186, 51 N.E. 1018 (1898); *State v. McAfee*, 64 N.C. 339 (1869); *Fendrick v. State*, 39 Tex. Cr. 147, 45 S.W. 589 (1898).

> "Moreover, even if there is no showing of actual bias in the tribunal, this court has held that due process is denied by circumstances that create the likelihood or the appearance of bias." (AT 502)

In essence, it has been impressed upon our judicial system that "circumstances that create the likelihood or appearance of bias" must be dealt with in such a manner as to give assurances to a criminal defendant placed in this precarious position that due process of law via his right to an impartial jury will be preserved at every stage of the proceedings. The impartiality and integrity of the jury system, the cornerstone of our judicial system, and the defendant's last sanctuary has been subverted in the case at bar.

III.

THE FIRST CIRCUIT IN *ROSS* DID NOT ERR IN HOLDING THAT *HAM V. SOUTH CAROLINA*, 409 U.S. 524 (1973) IS TO BE GIVEN RETROACTIVE EFFECT.

A. This Court Implicitly Decided That *Ham* Applied To The Case At Bar When It Summarily Vacated The Judgment Of The Supreme Judicial Court For The Commonwealth Of Massachusetts And Remanded The Case To That Court For Reconsideration In Light Of *Ham*.

The First Circuit Court of Appeals in deciding *Ristaino v. Ross* stated:

> "Our dissenting brother suggests that the rule of *Ham* should only apply to cases brought to trial

after the date *Ham* was decided. However, we do not feel the Writ should be denied on the ground that *Ham* should not be given retroactive application. The Supreme Court implicitly decided that *Ham* applied to this case when it summarily vacated the judgment of the Supreme Judicial Court of Massachusetts and remanded the case to that Court for reconsideration in light of *Ham*. See *Ross v. Massachusetts*, 410 U.S. 901 (1973)"

The Commonwealth in its Brief, at page 30, suggests that there is no support for this inference drawn by the First Circuit. Respondent suggests that ample support for this inference is contained in the cases of *Fuller v. Alaska*, 393 U.S. 80 (1968), *Desist v. U.S.*, 394 U.S. 244 (1969), and *Tehan v. U.S. ex rel Shott*, 382 U.S. 406 (1966).

In *Fuller, supra*, the issue before this Court on certiorari was whether *Lee v. Florida*, 392 U.S. 378 (overruling *Schwartz v. Texas*) should be retroactively applied so as to require reversal of a state criminal trial conviction based upon the admission of evidence violative of Section 605 of the Federal Communications Act. This Court affirmed by stating:

"Retroactive application of *Lee* would overturn every state conviction obtained in good faith reliance on *Schwartz*. Since this result is not required by the principle upon which *Lee* was decided, or necessary to accomplish its purpose, we hold that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee*." 393 U.S. 80, at 80-81.

Certainly, as in *Fuller*, this Court had every opportunity when *Ross* first presented his Petition for

Writ of Certiorari to grant his Petition and affirm his conviction by stating that *Ham v. South Carolina* was not to be given retroactive effect.

In *Desist v. U.S., supra*, Petitioner's Federal conviction for conspiracy to import and conceal heroin was affirmed by the Court of Appeals, and later by this Court. Certiorari was granted in *Desist*, and this Court held that *Katz v. U.S.*, 389 U.S. 347 (1967), was to be applied prospectively.

In *Tehan v. U.S. ex rel Shott, supra*, holding *Griffen v. California*, 380 U.S. 609 (1965), retroactive to all cases pending on direct review, Mr. Justice Stewart, writing for this Court stated at page 409:

"As in *Linkletter*, the question in the present case is not one of 'pure prospectivity.' The rule announced in *Griffen* was applied to reverse Griffen's conviction . . . Nor is there any question of the applicability of the *Griffen* rule to cases still pending on direct review at the time it was announced. Cf. *O'Connor v. Ohio*, 382 U.S. 286 (1965)."

Ross is indistinguishable from *O'Connor, supra*, the case which Mr. Justice Stewart stated implicitly decided the question of the application of *Griffen* to cases on direct review. In both *Ross* and *O'Connor*, the cases were still pending on direct review at the time the new case was announced, certiorari was granted, and judgment was vacated and remanded to the state's highest court in light of the new decision.

B. Where The Major Purpose Of New Constitutional Doctrine Is To Overcome An Aspect Of The Criminal Trial That Substantially Impairs Its Truth Finding Function And So Raises Serious Questions About The Accuracy Of Guilty Verdicts In Past Trials, The New Rule Has Been Given Complete Retroactive Effect.

Petitioners suggest that the question of the retroactive application to be accorded the rule in *Ham* is susceptible to analysis under the three prong test enunciated in *Stovall v. Denno*, 388 U.S. 293, 297 (1967). The test considers:

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." See Brief for the Petitioners at 32.[20]

While Respondent agrees that the three prong test of *Stovall, supra,* provides an analytical framework for dealing with problems of retroactivity, it is respectfully suggested that Petitioner misreads the *Stovall* test in affording equal weight to each of the three prongs. A careful examination of this Court's opinion in *Desist v. U.S.*, 394 U.S. 244, 249 (1969) reveals that in applying

[20]It is interesting to note that the case that Petitioners rely upon for setting the standard for "retroactivity" makes no distinction between direct and collateral review. In that case this Court stated: "We also conclude that for these (retroactive) purposes, no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review." ID at 300.

the test of *Stovall*, "foremost among these factors is the purpose to be served by the new constitutional rule." In *Williams v. U.S.*, 401 U.S. 646 (1971) (limiting *Chimel v. California*, 395 U.S. 752 (1969) to prospective application only), Mr. Justice White, speaking for this Court, stated:

> "Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances."

The purpose of the rule of *Ham*, dealing with the right to a fair and impartial jury, goes as much to the very heart of the fact finding function as any of the other cases of this Court that have been held retroactive, and raises such serious questions about the accuracy of guilty verdicts in past trials as to also require its retroactive application.[21]

[21]See *Argensinger v. Hamlin*, 407 U.S. 25 (1972) (held absent a knowing and intelligent waiver no person may be imprisoned for any offense, felony or misdemeanor without counsel), held retroactive in *Mays v. Harris*, 369 F. Supp. 1348 (W.D.Va. 1973); *White v. Maryland*, 373 U.S. 59 (1963) (excluding evidence of a guilty plea made without counsel) *Hamilton v. Alabama*, 368 U.S. 52 (1961) (right to counsel at arraignment), held retroactive in *Arsenault v. Massachusetts*, 393 U.S. 5 (1968); *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy provision of 5th amendment applicable to the states) held retroactive in *Price v. Georgia*, 398 U.S. 323 (1970); *Barber v. Page*, 390 U.S. 719

Indeed, even the Supreme Judicial Court for the Commonwealth of Massachusetts admits that the major

(1968) (absence of a witness from the jurisdiction would not justify the use at trial of preliminary hearing testimony unless the state had made a good faith effort to secure the witness' presence) held retroactive in *Berger v. California*, 393 U.S. 314 (1969); *Burgett v. Texas*, 389 U.S. 109 (1967) (conviction obtained in violation of *Gideon* cannot be used either to support guilt or enhance punishment for another offense) held retroactive in *Gilday v. Scafati*, 428 F.2d 1027 (1st Cir. 1970) cert. den. 400 U.S. 926 (1970); *Douglas v. California*, 372 U.S. 353 (1963) (benefit of counsel on first appeal as of right) held retroactive in *Maness v. Swenson*, 385 F.2d 943 (8th Cir. 1967); *Griffen v. Illinois* 351 U.S. 12 (1956) (state must furnish transcript to indigent on appeal) held retroactive in *Estridge v. Wash. State Bd. of Prison Terms and Parole*, 357 U.S. 214 (1958); *Gideon v. Wainwright*, 372 U.S. 335 (1963) indigent's right to counsel in felony case) held retroactive in *Pickilsimer v. Wainwright*, 375 U.S. 2 (1963); *Turner v. Louisiana*, 379 U.S. 466 (1965) (association between crucial prosecution witness and jury is a violation of due process held retroactive in *Gonzales v. Beto*, 405 U.S. 1052 (1972); *In re Winship*, 397 U.S. 358 (1970) (proof beyond reasonable doubt standard applicable to juvenile proceedings held retroactive in *Ivan V. v. City of N.Y.*, 407 U.S. 203 (1972); *Jackson v. Denno*, 378 U.S. 368 (1964) (submitting voluntariness of confession to jury and instructing them to disregard it if found involuntary, or if found voluntary to weigh it accordingly is unconstitutional) held retroactive in *U.S. ex rel Dickerson v. Rundle*, 363 F.2d 126 (3rd Cir. 1966) cert. den. 386 U.S. 916 (1967); *Klopfer v. N.C.*, 386 U.S. 213 (1967) (right to speedy and public trial applicable to the states) held retroactive in *U.S. es rel Stukes v. Shovlin*, 329 F. Supp. 911, aff'd 464 F.2d 1211 (3rd Cir. 1972); *Loper v. Beto*, 405 U.S. 473 (1972) (use of prior convictions void under *Gideon* for impeachment purposes violates due process; *Mayberry v. Pennsylvania*, 400 U.S. 405 (1971) (direct contempt must be adjudicated instantly or by judge other than one reviled) held retroactive in *Grizell v. Wainwright*, 481 F.2d 405 (5th Cir.

purpose of the *Ham* ruling is to overcome an aspect of the criminal trial that substantially impairs its truth finding function, and they believe that the "limited" rule announced in *Ham* should be given retroactive effect.[22] ''

It is Respondent's assertion that the right to trial by jury will be useless as a safeguard for a criminal defendant if the jury itself is not unbiased.

In this regard, the Supreme Judicial Court for the Commonwealth of Massachusetts has stated:

> "Justice cannot be assured in a trial where other considerations enter the minds of those who are to decide than the single desire to ascertain and declare the truth according to the law and the

1973); *Mempa v. Rhay*, 389 U.S. 128 (1967) (counsel required in revocation of probation and imposition of deferred sentencing proceeding) held retroactive in *McConnel v. Rhay*, 393 U.S. 2 (1968); *Bruton v. U.S.*, 391 U.S. 123 (1968) (admission at a joint trial of a defendant extrajudicial confession implicating a co-defendant violates 6th amendment) held retroactive in *Roberts v. Russell*, 392 U.S. 293 (1968); *Waller v. Florida*, 397 U.S. 387 (1970) (barred two prosecutions on double jeopardy grounds based on same offense) held retroactive in *Robinson v. Neil*, 409 U.S. 505 (1973); *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973) (held unconstitutional criminal abortion statutes prohibiting abortions during first trimester except to save life of mother) held retroactive in *U.S.* ex rel *Williams v. Preiser*, 497 F.2d 337 (2nd 1974); *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (death sentence may not be carried out if jury was chosen by excluding veniremen who voiced general objections to it).

[22] *Commonwealth v. Lumley*, Mass. Adv. Sh. (1975) 751, 759. Petitioner's Supplemental Brief in Support of Certiorari at 9.

evidence." *Crocker v. Justices of the Superior Court*, 208 Mass. 162, 179 (1911)

And this Court has said:

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial 'indifferent' jurors. The failure to afford an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257; *Tumey v. Ohio*, 273 U.S. 510. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworn.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf *Thompson v. City of Louisville*, 362 U.S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416. . ." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

Petitioners suggest that the *Ham* case, being directed toward the function of the jury, *DeStefano v. Woods*, 392 U.S. 631 (1968), as well as *Daniel v. Louisiana*, 420 U.S. 31 (1975), should control the case at bar. (See Brief for Petitioners at 35).

In *Daniel*, it was held that *Taylor v. Louisiana*, 419 U.S. 522 (1975) would not be given retroactive effect. A distinciton can be drawn, however, between the decision in *Taylor* and the decision in *Ham*. *Taylor*, when decided on January 21, 1975, announced a new rule of law, heretofore unstated, that the exclusion of women from jury service denied a defendant's Sixth

and Fourteenth Amendment right to an impartial jury. *Ham*, on the other hand, did not announce a new rule of law but simply clarified the basis for this Court's decision in *Aldridge*. Furthermore, it cannot be said that the absence of women jurors impaired the truth finding function of the jury, whereas the failure to exclude prejudicial jurors would have a significant impact upon the accuracy of jury verdicts.

In *DeStefano, supra*, it was held that *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Bloom v. Illinois*, 391 U.S. 194, would not be given retroactive effect. A distinction can be drawn between *Duncan* and *Bloom*, and *Ham*. In holding both *Duncan* and *Bloom* to be prospective only, this Court was greatly concerned with the reliance of the states on past decisions of this Court (e.g. *Maxwell v. Dow*, 176 U.S. 581), as well as the effect of retroactivity upon the administration of justice. See *DeStefano, supra*, at 634-635. Unlike *Duncan* and *Bloom*, however, a retroactive application of *Ham* would not upset any good faith reliance on the part of the Commonwealth on any past decision of this Court. The *Ham* principle went to the fairness of the trial. It overruled no line of Supreme Court decisions on which the state might have justifiably relied. To the contrary, it simply applied established case law that the essential demands of fairness requires that prospective jurors be inquired as to racial prejudice, and gave it constitutional underpinnings.

Certainly, the Supreme Judicial Court was aware of this Court's holding in *Aldridge*, as well as the various federal[23] and state[24] court decisions requiring questions

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[23] See cases in note 13, *supra*.

[24] See cases in note 12, *supra*.

to be put to prospective jurors as to racial prejudice. Nevertheless, the Supreme Judicial Court has been consistent in its failure to require that such questions be asked.[25]

Furthermore, Respondent does not agree that the First Circuit's ruling would have a "calamitous" effect on the administration of justice.

To begin, the First Circuit decision does not hold *Ham* to be "fully retroactive", but only to apply to *Ross*, a black criminal defendant. It is certainly premature without further clarification from the First Circuit to extend its decision in *Ross* "to all defendants who are members of a racial minority." (Petition for Writ of Certiorari at 36)

Second, the First Circuit has limited its decision to convictions involving violent crimes. At least, for the moment, convictions not involving violent crimes will not be afforded the same constitutional protection as that outlined in *Ross*.

Third, Respondent asserts that it is implicit in the decision by the First Circuit that its decision only applies to those criminal defendants who had proposed additional questions to the trial judge as to racial prejudice and the trial judge had refused or neglected to ask these questions.[26]

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[25]*Commonwealth v. Ryles*, Mass. Adv. Sh. (1973) 849, cert. den. 414 U.S. 980 (1973); *Commonwealth v. Rodriguez*, Mass. Adv. Sh. (1973) 1181; *Commonwealth v. Bumpus*, Mass. Adv. Sh. (1974) 477; *Commonwealth v. Pinckney*, Mass. Adv. Sh. (1974) 483; *Commonwealth v. Lumley*, Mass. Adv. Sh. (1975) 751. *Commonwealth v. Nassar*, 354 Mass. 249 (1968), *Commonwealth v. Lee*, 324 Mass. 714 (1949).

[26]In those states where the voir dire is conducted by the attorneys themselves, their failure to ask the questions would remove the case from the scope of the First Circuit decision.

Fourth, Respondent also asserts that in the 30 months since *Ham* was decided, many state and federal courts have presumably followed that decision. Therefore, for impact purposes, we need only be concerned with those state and federal proceedings commenced prior to *Ham*.[27] Mr. Justice Douglas, dissenting in *Adams v. Illinois*, 405 U.S. 278, 295 (1972) stated:

> "Inasmuch as the median state sentence served by felons when they are first released is about 20.9 months, most pre-*Coleman* sentences would now be served and as a practical matter these former prisoners would not seek judicial review."

Similarly, if *Ham* is given retroactive effect, many felons will have already completed their sentences.[28]

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[27]The Supreme Judicial Court has recently stated that:

> "As a practical matter, when a motion that prospective jurors be interrogated as to possible prejudice is presented, we believe that the trial judge should grant the motion. Our information indicates that since the *Ham* decision, such motions are being granted routinely in the Superior Court."

See *Commonwealth v. Lumley*, (Petitioner's Supplemental Brief for Certiorari at 6).

[28]According to the Massachusetts State Department of Corrections, the medium length of incarceration for felons at Walpole 1973-1974 (maximum security facility) was 28 months. The breakdown on specific crimes was:

manslaughter	–	36 months
armed robbery	–	38 months
unarmed robbery	–	31 months
other person	–	27 months
sex	–	40 months
arson-burglary	–	21 months
other property	–	21 months
narcotics	–	21 months
other	–	24 months

Fifth, Massachusetts General Laws, Chapter 234, §228, has itself been amended twice since the *Ham* decision. The most recent amendment, effective as of July 13, 1975, now requires the judge to question jurors who may have prejudices, providing in part that whenever it appears that a juror may not stand indifferent because of community attitudes, publicity, or "possible preconceived opinions towards the credibility of certain classes of persons", the court "shall" question that juror. (See Chapter 335 of the Acts of 1975)

Sixth, although both the Commonwealth and the Supreme Judicial Court urge upon this Court that retroactive application of *Ham* would have a calamitous impact on the administration of justice in Massachusetts, they are uncertain as to the number of defendants who would be affected.[29] Respondent asserts that although some black criminal defendants would certainly fall within the *Ross* decision, the effect on the administration of justice would neither be "calamitous" nor have a substantial impact thereupon.[30]

The view of the Commonwealth reflects the value judgment that the necessary administrative burden may not make it worth granting the benefits of the new rule to those convicted prior to its promulgation.

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[29]See *Commonwealth v. Lumley*, Mass. Adv. Sh. (1975) 751, Petitioner's Supplemental Brief in Support of Certiorari at 10.

[30]I have recently inquired of two (2) Justices of the Supreme Judicial Court and the Chief Justice of the Superior Court as to the number of defendants affected by the *Ross* decision. Their best estimates were that approximately 15 defendants would be so affected.

Respondent suggests that the priority of constitutional rights are the first magnitude.

> "It is difficult to see why prisoners have less of a right to be on these (crowded) dockets than the divorce and tort claimants who largely account for the present delay in the courts. The sense of injustice which compels retroactive application of the new rule in favor of convicted prisoners ought not be defeated merely by a fear of overworking the judiciary." See *Note, Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 950 (1962).

C. For Retroactivity Purposes, No Distinction Is Justified Between Convictions That Are Final, And Convictions At Various Stages Of Trial And Direct Review.

Petitioners submit that the First Circuit's retroactive application of *Ham* "should be limited to those cases still pending upon direct review and not extended to those cases in which judgment has become final." (See Brief for Petitioners at 38.) In fact, *Ross* was still pending on a writ of certiorari at the time of the *Ham* decision and, therefore, the judgment of the state court had not become final before the promulgation of the *Ham* rule. Respondent submits, however, that even though *Ross* is now on "collateral attack" via federal habeas corpus, such a distinction between "collateral attack" and "direct review" as is drawn by Petitioners is arbitrary and unreasonable, finding a lack of support in both law and logic. See *Williams v. U.S.*, 401 U.S.

646 (1971), *Stovall v. Denno*, 388 U.S. 293.[31]

Petitioner also suggests that application of a new procedural due process rule to judgments which have become final and are attacked collaterally upon a writ of habeas corpus violates a valid state interest in the "finality" of judgment. (See Brief for Petitioners at 7.)[32] Indeed, it could be argued that any state interest in the "finality" of judgment may be outweighed by the likelihood that continued and frequent consideration of constitutional claims will strengthen our moral

[31] Two simple hypotheticals can illustrate the arbitrariness of Petitioner's distinction.

a) X and Y are indicted together for the murder of Z. Y's attorney moves for a severence, which is granted. X's trial and appeals proceed to a conclusion, while Y's trial is delayed and still on direct review at the time a new case comes down affecting the rights of both X and Y. Under Petitioner's distinction, Y would now have the benefit of the new rule, whereas X, whose only remedy would now be via "collateral attack" would not have the benefit of the new rule even though X and Y both were charged with the same crime, against the same person, at the same time.

b) X and Y are both indicted on the same day for similar offenses in different states. In X's state, the court dockets are relatively empty so that X's trial and appeals proceed to a swift and final conclusion. In Y's state, the court dockets are crowded so that at the time of a new decision affecting both X and Y, Y is still on direct review. Under Petitioner's distinction only Y would have the benefit of the new rule even though both crimes were committed on the same date.

[32] According to the Massachusetts Department of Corrections the yearly cost to support an incarcerated individual in 1973-1974 at Walpole was $11,320. Therefore, Respondent submits that for so long as a person is kept in prison, the matter is "final" neither for him, nor for the society that supports him in that prison.

and intellectual resources in that it will make the public and bar more sensitive to due process considerations. See Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U.Chi. LR 719 (1966).

In support of its position that:

> "principles of comity and federalism and the very nature of the "Great Writ" itself, must be considered in determining whether a new rule is to be applied retroactively to a state court conviction attacked collaterally," (See Brief for Petitioners at 39)

Petitioners quote from *Kaufman v. U.S.*, 394 U.S. 217, 232 (1969) (Black, J., dissenting) that:

> "not every conviction based in part on a denial of a constitutional right is subject to attack by habeas corpus or Subsection 2255 proceedings after a conviction has become final."

Yet, the majority opinion in that case, holding a claim of unconstitutional search and seizure cognizable in such a proceeding stated at 228:

> "The approach adopted by the Court in *Thornton* and pressed upon us here exalts the value of finality in criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights. Such regard for the benefits of finality runs contrary to the most basic precepts of our system of post-conviction relief. In *Fay v. Noia*, a case involving a state prisoner who claimed that his conviction was coerced, we said that 'conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."

In *Brown v. Allen*, 344 U.S. 443 (1953) (opinion of Frankfurter, J.) it was stated:

> "The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized . . . It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world . . . Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments."

Respondent further submits that the issue of "retroactivity" when brought before the Court in a habeas corpus proceedings is largely illusory, i.e., the writ is available to state prisoners who are "in custody in violation of the Constitution" (28 USC subsection 2241(3)(c)) In acting on the Great Writ a Federal Court must determine whether a petitioning prisoner is "presently" detained in violation of the Constitution.

In passing on the legality of the prisoner's present detention, the legality of past detention is not the subject of the inquiry, and the Court sits as it always does under the Constitution as presently construed. There is a current controversy between the litigants to which the current law is to be applied in the judicial process. See Meador, *Habeas Corpus, the Retroactivity Illusion*, 50 Va. L. Rev. 1115 (1964). Therefore, since *Ham* is the current state of the law, it should be applied to *Ross*, thereby obviating the issue of *Ham's* retroactive application.

Finally, Respondent asserts that for this Court to adopt prospective overruling would be to discourage the

bringing of new ideas to appellate courts for fear that the litigants will be arguing the case for others and not themselves. See *Moliter v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11 (1959) cert. den. 362 U.S. 968 (1960). Therefore, to declare in the *Ham* case a basic constitutional protection, and then to withhold the benefit of the rule for future application only, would do little to enhance the image of justice, and would do little for Ross, who has struggled for over four years and six appellate hearings to obtain a new trial.

IV.

EVEN IF *HAM V. SOUTH CAROLINA*, 409 U.S. 524 (1973) DID NOT ENUNCIATE A NEW CONSTITUTIONAL RULE OF UNIVERSAL APPLICABILITY, THIS COURT SHOULD NOW ANNOUNCE SUCH A RULE IN *ROSS*.

Respondent suggests that if the interpretation accorded *Ham* by the Petitioners is correct, i.e., even if *Ham* did not enunciate a new constitutional rule of universal applicability, this Court, for all the foregoing reasons, should now declare such a rule in *Ross*.

CONCLUSION

From the foregoing, it is clear that the United States Court of Appeals for the First Circuit did not err in affirming a decision of the United States District Court for the District of Massachusetts granting Respondent's

Petition for Writ of Habeas Corpus based upon the failure of the trial judge to inquire of the prospective jurors specifically as to racial prejudice.

Respondent urges this Court to affirm. As was stated in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (Douglas J., dissenting):

> "Our federal district courts and Courts of Appeals are much closer to law administration in the respective states than we are in Washington, D.C. They are responsible federal judges who know the Federal Constitution as well as we do ... When a Court of Appeals honors the Constitution by granting the Great Writ or in its solemn judgment denies it, we should let the matter rest there, save for manifest error.

Failure of this Court to affirm the decision of the First Circuit Court of Appeals:

> "is to see (the) decision in *Ham v. South Carolina* stillborn and to write an epitaph for those 'essential demands of fairness' recognized by this Court 40 years ago in *Aldridge*. I fear that we 'bring the processes of justice into disrepute' not only by sanctioning the denial of a right required by 'essential demands of fairness' but also in failure to compel compliance by the court below

(Supreme Judicial Court for the Commonwealth of Massachusetts) with a precedent of this Court. . ." (App. 137-142 AT 142)

Respectfully submitted,[33]

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[33]Counsel acknowledges the assistance of Lawrence E. Besser of the University of Miami School of Law in the preparation of this Brief and appreciates his hard work on behalf of Respondent.

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In the Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-1216.

THEODORE RISTAINO ET AL.,
PETITIONERS,

v.

JAMES ROSS, JR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Reply Brief for Petitioners.

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Reply Brief for Petitioners.

I. THE LOWER STATE COURTS HAVE NOT HELD CONSISTENTLY THAT QUESTIONS ADDRESSED TO PROSPECTIVE JURORS ON VOIR DIRE ARE CONSTITUTIONALLY REQUIRED IN EVERY INSTANCE.

Respondent relies upon numerous state court cases to support his contention that questions concerning possible racial bias are constitutionally required regardless of the circum-

stances of the case.[1] However, examination of these cases reveals that, for the most part, the various state courts merely note approval of expanded voir dire. For example: *Gholston* v. *State*, 221 Ala. 556, 130 So. 69 (1930), held that it was not reversible error for the trial court to ask the requested question and that discretion whether to put the questions remained in the trial judge; *Herndon* v. *State*, 178 Ga. 832, 174 S.E. 597 (1934), specifically rejects the contention that specific questions are constitutionally required; *People* v. *Decker*, 157 N.Y. 186, 51 N.E. 1018 (1898), is based upon the state code of criminal procedure. Petitioners concede that two cases relied upon by respondent were apparently decided upon constitutional grounds, *Hill* v. *State*, 112 Miss. 260 (1916); *Pinder* v. *State*, 27 Fla. 370 (1891); however, the decisions in these cases rested upon the Sixth Amendment right to an impartial jury, a position not adopted by the majority of this court in *Ham* v. *South Carolina*, 409 U.S. 524 (1973). Moreover, in *State* v. *McAfee*, 64 N.C. 339 (1870), the court, in holding that the denial of the question addressed to racial prejudice was reversible error, pointed out that prejudice would be likely to arise " . . . especially in charges of this character" (rape). 64 N.C. at 340. Thus the decision is consistent with the construction of *Ham* urged by the petitioner.

Petitioners further submit that the federal cases relied upon by respondent were decided either solely within the court's supervisory power and in accord with the dictates of *Aldridge* v. *United States*, 283 U.S. 308 (1931),[2] or involved special

[1] See, Respondent's Brief, p. 24, fn. 13, and p. 30, fn. 19.

[2] *Frasier* v. *United States*, 267 F. 2d 62 (1st Cir. 1959); *King* v. *United States*, 362 F. 2d 968 (D.C. Cir. 1966); *United States* v. *Booker*, 480 F. 2d 1310 (7th Cir. 1973); *United States* v. *Carter*, 440 F. 2d 1132 (6th Cir. 1971); *United States* v. *Gore*, 435 F. 2d 1110 (4th Cir. 1970).

circumstances, *e.g.*, *Silverthorne* v. *United States*, 400 F. 2d 627 (9th Cir. 1968), "voluminous" pretrial publicity.

II. Refusal of the Trial Judge to Examine Prospective Jurors Regarding Possible Racial Prejudice does Not Necessarily Void a Criminal Conviction Absent a Demonstration of Prejudice.

Respondent's Reliance upon Peters v. Kiff, 407 U.S. 493 (1972), is Misplaced.

In *Peters*, *supra*, the majority of the Court held that to subject a defendant to trial by a jury which was "plainly illegal in their composition" denied a defendant due process of law. Given the illegal nature of the jury involved in that case and based upon the proposition that " . . . our system of law has always endeavored to prevent even the *probability* of unfairness," 407 U.S. at 502 (emphasis supplied), the majority appears to have foregone the requirement that it be demonstrated that a petitioner's *conviction has resulted from* the denial of a federally secured right. *Alderman* v. *United States*, 394 U.S. 165, 171-174 (1969).

Respondent seeks to equate the "possibility" of prejudice in the instant case with the "probability" of prejudice inherent in *Peters*, *supra*. Petitioners suggest that there is no basis in law for making such an equation.

In addition, petitioners suggest that the circumstances of the instant case were not such as to create a serious "probability of unfairness" so as to negate the requirement that it be demonstrated that the trier of fact was actually affected by prejudice. Cf. *Jordan* v. *Massachusetts*, 225 U.S. 167 (1912), *Irvin* v. *Dowd*, 366 U.S. 717 (1961). The instant case does not involve a defendant's Sixth Amendment right to an impartial jury. The

question here is whether a trial judge is constitutionally required to pose certain questions to prospective jurors when so requested by a defendant. If the request is denied or if no such request is made the composition of the jury may well remain the same. Petitioners suggest that there is no logical basis for maintaining that in the first instance it is probable that a non-impartial jury will result, but that in the second instance the jury will meet Sixth Amendment requirements. Rather, the questions are mandated only when the circumstances attendant to the case dictate that fundamental fairness (not perfection) may be met only if the defendant is allowed to pose questions designed to elicit prejudicial attitudes which would affect the jurors' ability to render an independent judgment based only upon the evidence adduced at trial. In this posture, petitioners suggest that the burden is upon the respondent to demonstrate that the refusal to ask the proposed question constitutes actual or probable prejudice. ***Witherspoon*** v. ***Illinois***, 391 U.S. 510 (1968).

III. Retroactive Application of a Rule Requiring that Prospective Jurors be Inquired of as to Possible Racial Prejudice during Voir Dire would have a Substantial Impact upon the Administration of Justice.

Respondent seeks to minimize the impact of retroactive application of a rule requiring a trial judge to pose questions designed to elicit possible racial prejudice to prospective jurors on voir dire by relying upon conversations with unnamed judges (Respondent's Brief, p. 42) which are totally outside the record before this Court. Petitioners would bring to the attention of this Court the fact that three additional cases involving the same issue have been decided by the Appeals Court of

Massachusetts subsequent to the filing of petitioners' brief.[3] Four additional cases are now pending argument or decision on the same or related issues.[4]

Respondent also seeks to minimize the effect of retroactive application by asserting that many convicted felons would already have been released from incarceration. In support of this proposition he cites some undocumented figures purportedly supplied by the Massachusetts Department of Correction (Respondent's Brief, p. 41). Respondent totally ignores the fact that petitions for writ of habeas corpus may be filed in the federal court by state prisoners released on parole. ***Jones*** v. ***Cunningham***, 371 U.S. 236 (1963). He also ignores the fact that the Court has not ruled on whether the proposition announced in ***Ham*** was a constitutional rule of universal application or merely limited to its facts. Hence, the enunciation of a new rule now would allow prisoners still incarcerated or on parole to bring a writ of error in the state courts. The writ of error is not limited to those incarcerated at the time the proceeding is brought but is available to attack a judgment, not the constitutionality of custody. Mass. Gen. Laws, c. 250, §§ 1, 9. Petitioners therefore submit that neither they nor the Supreme Judicial Court of Massachusetts have overstated the substantial effect on the administration of justice a retroactive application of the rule of ***Ham*** (assuming ***arguendo***, that such a rule was announced therein) would have in this Commonwealth.

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[3] ***Commonwealth*** v. ***Jackson***, 327 N.E. 2d 912 (1975), Mass. App. Ct. Adv. Sh. (1975) 743; ***Commonwealth*** v. ***Anderson***, 334 N.E. 2d 61 (1975), Mass. App. Ct. Adv. Sh. (1975) 1082; ***Commonwealth*** v. ***Harrison***, 321 N.E. 2d 672 (1975), Mass. App. Ct. Adv. Sh. (1975) 59.

[4] ***Commonwealth*** v. ***Corey and Hall***, No. 419; ***Commonwealth*** v. ***James Hall***, No. 287; ***Commonwealth*** v. ***Frank Grace***, No. 63; ***Commonwealth*** v. ***Ross Grace***, No. 66.

Conclusion.

For the reasons stated in their brief and in this reply brief, petitioners respectfully request this Court to reverse the judgment of the court below.

Respectfully submitted,

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